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Montana Rules of Evidence: A General Survey

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MONTANA RULES OF EVIDENCE: A GENERAL SURVEY

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I. INTRODUCTION

On July 1, 1977, the Montana Rules of Evidence became effective by Supreme Court Order No. 12729[1] for all trials held after that date. With a few major exceptions, the Rules embody generally accepted principles of the law of evidence. The transition to their use should not have proven traumatic.

An understanding of the history of the Rule drafting process is helpful to an analysis of their substance. The Montana Commission on Rules of Evidence began as a committee of the Montana Bar Association. In April of 1974 its members were appointed to the Commission by the supreme court to formulate Rules of Evidence.[2] The Commission obtained funding from the Montana Board of Crime Control with matching funds from the supreme court. Its work commenced on July 1, 1974, when this author began work as the reporter for the Commission.

For the sake of uniformity and convenience, the Commission decided to use the Federal Rules of Evidence numbering system. Similarly, the substance of the Federal Rules was to be followed whenever possible to provide uniformity between federal and state procedures. However, the Commission adopted the policy that the substance of the Montana Rules would retain the Montana law of evidence when balanced against the Federal Rule; there would be no change for change's sake. Therefore, the Montana Rules were to lean toward the Federal Rules yet retain desirable Montana law.

1. ___ Mont. ___, 34 St. Rep. 302A (1976).

2. The Montana Rules of Evidence pamphlet published by the State Bar of Montana contains the petition of the Montana Bar Association for the creation of the Commission and the order creating the Commission, pp. I and III respectively.

During the time the Commission was drafting the Rules, Congress reviewed and changed the Federal Rules of Evidence, in most instances changing away from reform and toward the common law. Other states were adopting rules based on the Federal Rules and the Uniform Rules of Evidence, based on the Federal Rules, were being circulated in draft form. This meant that the Commission had plausible alternatives other than existing Montana law and the Federal Rules to choose from when drafting rules. In the final analysis the Commission chose rules which it felt best served reform within existing Montana law and complied with the Federal Rules whenever possible. It is interesting to note that the federal drafters also relied upon several previous codifications. Among these was the California Evidence Code of 1965 which was a combination and reworking of the Uniform Rules of Evidence of 1953 and the California version of the Field Code provisions on evidence. Since Montana's then existing evidence code was almost identical to the former California Code, the similarities between the coverage of existing Montana provisions and the Federal Rules were striking. Thus, the majority of the Rules continue to cover the same areas as the previous evidence code, although certainly changes were made within those areas.

The Commission also determined that each rule should be accompanied by a comment which compared the Montana rule with the Federal rule, gave a brief statement of the Commission's reasons for adopting it, and analyzed the rule's effect on existing Montana law. A more complete explanation of the rules was left to the Federal Rules' Advisory Committee's Notes which were to complement the Commission Comments.

Although this article is not intended as a comparison of the Rules with existing Montana law, it does contain reference to both the Montana Commission Comments and Federal Advisory Committee's Notes as well as various commentators' thoughts on the areas of the law covered. It is the author's hope that the practitioner can gain a better view of the Rules and how to practice under them.

II. Article I General Provisions

A. *Title, Scope, and Purpose of the Rules*

The Montana Rules begin with two rules which are quite different in organization from the Federal Rules. Montana Rules 100 and 101 give the title and scope of the rules, while this is accomplished in a separate article, Article XI, in the Federal Rules. The Commission considered it to be much simpler and clearer to include Montana's provisions at the beginning of the rules, particularly because the scope provisions are less complex than their Federal counterpart.

Rule 100 states that the Rules shall be known and cited as the Montana Rules of Evidence. While there is no official abbreviation, some commentators and Federal courts are referring to the Federal Rules as "FRE" so it is logical to assume that the Montana Rules could be referred to as "MRE."

Rule 101 states the scope of the rules in three subdivisions: the first two indicate where the Rules do apply, the third where they do not. Subdivision (a) indicates the Rules apply in all proceedings in all courts in the state of Montana. This means that the rules apply in both civil and criminal cases: where the peculiar nature of each type of case demands separate treatment, that treatment is given. This subdivision also means that the Rules apply in lower courts, and even in the supreme court, in the event of an evidentiary hearing before that tribunal. The Rules apply only in courts for two reasons: first, the constitutional authority of the supreme court to promulgate these rules extends only to courts;[3] and second, the Commission did not draft the Rules to specifically apply in administrative hearings, as this is a matter of administrative law.[4] Subdivision (b) indicates that the rules of privilege found in Article V, which incorporates all statutory privileges by reference, apply in all stages of all actions and proceedings. This resolves problems which could occur under the next subdivision, involving suspension of the Rules, because the substance of a privileged communication is never to be divulged.[5]

Subdivision (c) enumerates five situations in which the Rules are inapplicable: under Rule 104(a), grand jury proceedings, miscellaneous criminal proceedings, summary proceedings, and miscellaneous civil proceedings. Discussion of the first situation under Rule 104(a) will be found with that Rule. The second situation, suspension of the Rules in grand jury proceedings, is also found in the Federal Rules and is based upon two separate factors. First, it is impractical to require the Rules of Evidence to apply in such a proceeding because there is usually no opposing counsel to object or judge to rule objections and lay jurors conduct the inquiries. Second, the United States Supreme Court rejects the proposition that

3. MONT. CONST. art. VII, § 2(3) provides that the Supreme Court of Montana has authority to establish rules and procedure for all courts of the state.

4. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 82-4210(1) (Supp. 1977) provides in pertinent part that "[e]xcept as otherwise provided by statute directly relating to an agency, agencies shall be bound by common law and statutory rules of evidence." One such exception is found in R.C.M. 1947, § 92-852(1) (Supp. 1977), which provides that the Workers' Compensation Court is not bound by rules of evidence.

5. *See* Commission Comment to this subdivision indicating that R.C.M. 1947, § 93-701-4 could be construed to state this proposition.

indictments must be based on legal evidence,[6] nor apparently does Montana law require evidence in grand jury proceedings to be legally admissible.[7] The third instance in which the Rules do not apply is in miscellaneous criminal proceedings and youth court actions. The paragraph is a composite of the equivalent Federal Rule and of other situations in which the Commission felt that application of the Rules is unnecessary. In all the proceedings listed the judge acts without a jury, and his determinations do not relate to guilt or innocence. The Commission Comment, however, indicates that substantive due process is not to be abrogated by the suspension of the Rules: the court may apply the Rules in these proceedings when it considers them necessary.[8] Other reasons for not applying the Rules in these situations relate to two considerations: first, determinations of probable cause do not have to be based on admissible evidence;[9] and second, where the proceeding is ex parte in nature, there is no likelihood of objections being raised and no need to apply the Rules. The fourth instance in which the Rules do not apply is where the court acts summarily, such as in contempt proceedings. Whenever the court is authorized by statute to act summarily, it may conduct proceedings without regard to the Rules because as a practical matter the Rules need not be applied. This paragraph does not apply to summary judgments under Rule 56 of the Montana Rules of Civil Procedure. Finally, the Rules do not apply in miscellaneous civil proceedings which are ex parte or uncontested in nature. Again, where there will be no objecting party, there is no need for the Rules to apply.

The purpose and construction of the Rules is set out in Rule 102, which is identical to the Federal and Uniform (1974) Rules. This provision is similar to provisions in other sets of rules,[10] and is designed to prevent technical rulings on evidentiary matters which result in injustice. The theme of the Rules, therefore, is to "admit evidence unless some good reason exists to exclude it."[11]

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6. Costello v. United States, 350 U.S. 359, 363 (1963). *See* Advisory Committee's Note to FED. R. EVID. 1101(d)(2), 56 F.R.D. 183, 351 (1972) (citing *Costello* and 1 WIGMORE ON EVIDENCE § 4 (5) (3d ed. 1940). *See also* United States v. Callandra, 414 U.S. 338, 343-50 (1974).

7. R.C.M. 1947, § 95-1408(1) (Supp. 1977) provides that:

> In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it or furnished by legal documentary evidence or the deposition of a witness in the cases mentioned in 95-1802.

8. Commission Comment to Montana Rules of Evidence [hereinafter cited as Mont. R. Evid.] 101(c).

9. State v. Miner, 169 Mont. 260, 264, 546 P.2d 252, 254-55 (1976).

10. *See,* for example, FED. R. CRIM. P. 2; R.C.M. 1947, § 93-2801-1.

11. Commission Comment to MONT. R. EVID. 102.

B. *Rulings on Evidence*

As a practical matter, Rule 103, Rulings on Evidence, will be the most used of any of the Rules of Evidence because no other rules will ever be applied unless there is a request for a ruling from a party. Rules of evidence are procedural in nature, rather than substantive, and unless a rule of evidence is asserted in an objection, motion to strike or offer of proof, any right to have evidence admitted or excluded under that rule is waived.[12] Therefore if the practitioner wishes to have a rule of evidence applied, it is extremely important that he thoroughly understand Rule 103.

This Rule is drafted in terms of protecting the rights of parties in the event a ruling is challenged in a later proceeding or appeal. The Advisory Committee's Note to Federal Rule 103(a) sets out the general requirements and reasons for this rule:

> Rulings on evidence cannot be assigned as error unless (1) a substantial right is affected, and (2) the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. The objection and offer of proof are the techniques for accomplishing these objectives.[13]

As the Commission Comment to this Rule indicates, these principles are consistent with Montana law and practice.

It is apparent, then, that before error may be predicated upon a ruling admitting or excluding evidence, the ruling must first affect a substantial right of the objecting party. There will be no reversal of a ruling if the error is technical only or if it results in harmless error. In fact, this is the long-standing "harmless error" provision of the rules of evidence and there is no intent to change that provision with Rule 103.[14]

When the Federal Rules were circulated for comment, some observers criticized Rule 103 for not defining the terms "substantial rights" and "affected."[15] They questioned whether there is a distinction between an error which could affect substantial rights and a harmless error. For example, a violation of substantial rights, such as illegal wiretap evidence, could be introduced and have no effect on the outcome and so be a harmless error.[16] It is notable that

12. Ladd, *Objections, Motions, and Foundation Testimony*, 43 CORNELL L.Q. 543, 544 (1958).

13. Advisory Committee's Note to FED. R. EVID. 103(a), 56 F.R.D. 183, 195 (1972).

14. *Id.*

15. FARAGE, CRITIQUE OF THE PROPOSED FEDERAL RULES OF EVIDENCE, ABA SEC. INS. NEG. & COMP. L. PROC. 433 (1970).

16. Schwartz, *The Proposed Federal Rules of Evidence: An Introduction and Critique*, 38 U. CIN. L. REV. 449, 453 (1969).

previous codifications[17] used a test of whether the admission or exclusion of the evidence affected the outcome of the trial, not whether a substantial right is affected. Perhaps this criticism is misplaced. A close reading of Rule 103 indicates that an error is harmless *unless* it affects substantial rights, not that an error is prejudicial *if* it affects substantial rights without more.[18] In any event, the phrase "affects substantial rights" is currently used in at least four provisions[19] concerned with predication of error on appeal and should constitute no problem in Montana.

The Advisory Committee's Note to this Rule[20] also implies that it does not affect the doctrine of harmless error in the sense of violation of constitutional rights. Therefore, it is intended that the use of the term "substantial rights" states the law generally accepted today.

The second requirement to be met before error may be predicated upon a ruling is that the nature of the error was called to the attention of the judge. This is accomplished by three means, corresponding to two different situations: rulings admitting evidence and rulings excluding evidence. The proper means of pointing out error for rulings admitting evidence is an objection, accompanied, if necessary, by a motion to strike. The proper means of pointing out error to rulings excluding evidence is an offer of proof.

A proper objection or motion to strike must be timely and specific. The timeliness requirement applies so that the objecting party makes known the objection as soon as the applicability of the rule is known.[21] As previously noted, both the judge and counsel should be made aware of the error when it occurs so that meaningful corrective action may be taken. Further, a party should not be allowed to gamble that an answer containing inadmissible evidence could be favorable, but, if unfavorable, be allowed to later object to the answer.[22] If there are instances in which an objection cannot be interposed between question and answer, for example, with a forward witness or where the grounds for the objection are not apparent, the remedy is a motion to strike.[23] The requirement that the objection

17. MODEL CODE OF EVIDENCE rules 6 and 7 (1942); UNIFORM RULES OF EVIDENCE 4 and 5.

18. Rothstein, PRACTICE COMMENTS TO RULES OF EVIDENCE FOR U.S. COURTS AND MAGISTRATES 14 (1973).

19. R.C.M. 1947, § 93-5603 (grounds for new trial); MONT. R. CIV. P. 61 (harmless error); MONT. R. APP. CIV. P. 14 (review of rulings on appeal); and R.C.M. 1947, § 95-2425 (appeals in criminal cases).

20. 56 F.R.D. 183, 195 (1972).

21. 1 WIGMORE ON EVIDENCE § 18 at 323 (3d ed. 1940).

22. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 133 (2d ed. 1972). *See also* Yoder v. Reynolds, 28 Mont. 183, 194, 72 P. 416, 419 (1903).

23. MCCORMICK, *supra* note 22, at 113.

be specific also allows corrective action. The objecting party must make known to the court and opposing counsel the grounds or rule upon which the evidence should be excluded so that opposing counsel may elicit admissible evidence to prove that part of his case. Further, this requirement looks toward appellate review. If the judge overrules a timely objection made upon the wrong grounds and so admits the evidence, he has properly ruled. The party has not expressed the proper reason for excluding the evidence[24] and has waived objection on other grounds.[25] This requirement nullifies the "general" objection which does not state the specific ground of exclusion. For example, the objection that evidence is "incompetent" is insufficient.[26] Although this Rule does not require the specific grounds to be stated if they are apparent from the context, the better practice is to state the grounds.

Rulings excluding evidence must be handled in a different manner, through an offer of proof, so that the substance of evidence is made known and put in the record. The party conducting the examination must make an offer of proof only after the exclusion of offered evidence. The purpose of the offer of proof is to point out to the judge that an error has been made and to allow corrective action. Although it is reasonable to assume that a trial judge could reverse his ruling after hearing the substance of the evidence in the offer of proof,[27] the Supreme Court of Montana stated the principal reason for an offer of proof in terms of appellate review: "It is impossible for this court to say whether certain evidence was improperly excluded, unless the record discloses the offered evidence."[28] Again, an exception to the offer of proof requirement exists in the Rule if the substance of the answer is apparent from the context, but the better practice is to state the substance of the answer to avoid confusion.

Subdivisions (b) and (c) of Rule 103 go on to detail the process of making offers of proof that is found in Rule 43 (c), Montana Rules of Civil Procedure. These subdivisions allow the trial court to add any statement in the record to clarify the situation or require the offer to be made in question and answer form, and allow the trial court to ensure that inadmissible evidence is not suggested to the jury through an offer of proof.

The final subdivision of Rule 103 deals with plain error, a topic which is probably new to Montana law. As a general rule, the su-

24. Ladd, *supra* note 11, at 544.

25. Baker v. Union Assurance Soc'y of London, 81 Mont. 281, 299, 264 P. 132, 138 (1928).

26. City of Helena v. Albertose, 8 Mont. 499, 504, 20 P. 817, 818 (1889).

27. McCORMICK, *supra* note 22, at 110.

28. Milwaukee Gold Extraction Co. v. Gordon, 37 Mont. 209, 223, 95 P. 995, 1000 (1908).

preme court will consider only questions raised during trial through objection, motion to strike or offer of proof.[29] As indicated in the Commission Comment to this subdivision, there are exceptions to this practice which permit certain issues to be raised on appeal for the first time. These include constitutional questions,[30] jurisdictional questions,[31] and the issue of whether the complaint supports the judgment.[32] The Commission concluded that it is proper to extend the same considerations to rulings on evidence which affect the substantial rights of the parties. The application of the plain error rule, however, remains discretionary with the court, and is not a matter of right, even when requested by a party. The fact that only the court has the power to invoke this rule is enough to indicate that the better practice is to make proper objections and offers of proof rather than to rely on this subdivision.

C. *Preliminary Questions of Admissibility*

Rule 104 addresses the question of whether the judge or jury will determine preliminary questions of fact in admitting evidence, qualifying persons to be witnesses, and determining the existence of a privilege. The first subdivision provides that the judge shall decide these matters while the determination of ultimate fact is left with the jury. An example of such a preliminary question involves the determination of the existence of a marital privilege. The judge first answers the question of whether a valid marriage exists, and if so, whether a valid husband-wife privilege may be claimed. In most instances the judge is in a much better position to make these determinations than the jury. The determination of the admissibility of a confession is a clear example of the judge's superior position. Certainly it would be difficult for jurors to determine that a confession was not made voluntarily and then exclude its existence from their minds when making the ultimate determination of guilt or innocence.[33] Under Rule 101(c)(1) the rules of evidence do not apply to these preliminary determinations. In the foregoing example, it would be helpful for the judge to view the contents of the confession before making a determination of voluntariness. Yet the rules of

29. Spencer v. Robertson, 151 Mont. 507, 511, 455 P.2d 48, 50-51 (1968); *See also* MONT. R. APP. CIV. P. 2 and 3.

30. In re Clark's Estate, 105 Mont. 401, 409, 74 P.2d 401, 406 (1937).

31. Labbit v. Bunston, 80 Mont. 293, 303, 260 P. 727, 731 (1927); *See also* MONT. R. APP. CIV. P. 12(h)(2).

32. Crenshaw v. Crenshaw, 120 Mont. 190, 201, 182 P.2d 477, 483 (1947); Tracy v. Harmon, 17 Mont. 465, 468, 43 P. 500, 501 (1896); *see also* Halldorson v. Halldorson, ___ Mont. ___, ___, 573 P.2d 169, 171-72 (1977).

33. Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 393 (1929).

evidence, if applied, would not permit such viewing. In any event, Rule 104(a) makes clear that while not bound by rules of evidence, the judge is bound by the rules with respect to privilege in making the determination of the existence of a privilege. Therefore, the substance of the privileged communication will always be protected.

Another problem arises in this area when the determination of a preliminary question coincides with an ultimate question of fact, that is, when the determination of the preliminary question has the effect of deciding the ultimate question. For example, when a plaintiff sues on a lost instrument, the preliminary determination of the admissibility of secondary evidence will have the effect of determining the outcome, for if the judge rules the secondary evidence inadmissible, plaintiff has failed to prove his case.[34] No Montana case addresses such a problem, so it appears that the usual rule will be followed. The judge will make the determination without regard to its effect on the outcome.

Rule 104(b) differs from its federal counterpart. The Federal Rule permits the jury to make determinations of relevancy of evidence when that determination is dependent upon the existence of a preliminary fact. The originator of the "conditional relevance" theory, Professor Edmund Morgan, believed that while there are instances when the jury must be protected from inadmissible evidence, the determination of relevancy conditioned on the existence of another preliminary fact was much like determinations of ultimate facts. That is, in the determination of ultimate facts the jury must decide whether to believe or disbelieve that certain facts existed. The same process occurs in making the determination of relevancy of a fact because the jury must believe or disbelieve that certain preliminary facts exist to determine relevance.[35] Another reason in favor of the Federal Rule is that in not allowing the jury to make determinations of this sort the jury would be greatly restricted in its function as trier of fact.[36]

Despite the Rule's theoretical soundness, the Commission considered it impractical when applied to different situations: this is crucial because such questions are for the jury, not the judge. Examples given by Morgan[37] differ entirely from those given by the Advisory Committee's Note to the Federal Rule,[38] thus no clear definition of "conditional relevance" exists. The Commission chose to substitute the standard "connecting-up" rule long recognized in Montana

34. McCORMICK, *supra* note 22, at 124.
35. MORGAN, BASIC PROBLEMS IN EVIDENCE 45 (1962).
36. Advisory Committee's Note to FED. R. EVID. 104(b), 56 F.R.D. 183, 198 (1972).
37. MORGAN, *supra* note 35, at 45.
38. Advisory Committee's Note to FED. R. EVID. 104(b), 56 F.R.D. 183, 198 (1972).

which allows a party to admit evidence subject to the condition that its admissibility be shown by a subsequent witness. The rule is necessary because of the impossibility of simultaneous presentation of all witnesses to obtain a chronologically correct presentation of the facts in a case. The only real difficulty with the connecting-up rule is the problem arising when the evidence is not connected-up. The only solution is to strike the non-connected-up evidence. Montana, following the majority rule, requires opposing counsel to object and move to strike.[39] This becomes a critical problem in cases where potentially prejudicial evidence is admitted without being connected-up, because attempts to erase the evidence from the jurors' minds with motions to strike and instructions to disregard are probably futile.

The third subdivision of Rule 104(c) makes it clear that hearings on the admissibility of confessions are to be conducted out of the presence of the jury; that when the accused is a witness, confessions should be out of the presence of the jury when he so requests; and that the jury may be excluded for other preliminary matters, as the interests of justice require.

Subdivision (d) of Rule 104 is a special provision for criminal cases allowing and encouraging the accused to testify on preliminary matters without subjecting himself to cross-examination as to other matters in the case. This subdivision is not intended to change the rule in Montana allowing complete cross-examination of an accused who takes the stand during trial and denies that he committed the crime for which he is on trial.[40]

Part (e), the final subdivison of Rule 104, is intended to guarantee the parties the right to introduce evidence and argue its weight and credibility, a right which could be viewed as circumscribed by subdivision (a) limiting determinations of preliminary questions to the court. To illustrate, evidence may be admitted which has the effect of challenging the competence of a witness. This should be allowed to go to weight and credibility of his testimony under subdivision (e), even though the court has already made a determination of competence under subdivision (a).

D. *Limited Admissibility*

Rule 105 provides that evidence may be admitted for a special purpose even though it is inadmissible for another or general purpose. This is accomplished by allowing evidence to be limited to the

39. Pfau v. Stokke, 110 Mont. 471, 474, 103 P.2d 673, 674 (1940); State v. Simanton, 100 Mont. 292, 309, 49 P.2d 981, 985 (1935).

40. State v. Rogers, 31 Mont. 1, 7, 77 P. 293, 295 (1904).

special purpose through an instruction to the jury. This rule is recognized in Montana[41] and has been applied in several cases. In one instance the court permitted evidence of prior fires on the defendant's right of way, not for the purpose of showing negligent conduct, but to show that the defendant had permitted combustible material to accumulate.[42] In another, the court held certain hearsay testimony admissible, not as proof of the facts, but to show what information was available to draft pleadings and as a chain of explanatory circumstances.[43] In another, the court admitted evidence against both principal and surety, indicating that if the surety had wished the evidence limited to use against the principal, it should have asked for a limiting instruction, because failure to do so waived the right to claim error.[44] In connection with this, it has been held that counsel has the duty to separate the admissible from inadmissible evidence. He must request the evidence to be admitted for a special purpose, for when a court is faced with an objection it is not its duty to separate admissible from inadmissible evidence.[45] In another case the court held parole evidence admissible, not to change or vary the terms of the deed, but to show consideration for the terms.[46] Yet another case held exhibits admissible, not for the purpose of proving the wealth of defendants, but to establish their identity as officers of a corporation.[47] Finally, the court has held a photograph admissible, not for the purpose of showing subsequent remedial measures, but to show the scene of the accident.[48]

The Advisory Committee's Note to Federal Rule 105[49] indicates one of the major problems with this rule is its introduction of potentially prejudicial evidence and the ineffectiveness of a limiting instruction. It points out the problem is particularly critical with criminal cases, citing *Bruton v. United States*,[50] which held that a limiting instruction was inadequate where a codefendant's confession inculpating Bruton was admitted with such an instruction. The practitioner must be aware of this problem with Rule 105.

41. Outlook Farmers' Elevator Co. v. American Sur. Co., 70 Mont. 8, 25, 223 P. 905, 911 (1924).

42. Pure Oil Co. v. Chicago, Milwaukee & St. Paul Ry., 56 Mont. 266, 275, 185 P. 150, 152 (1919).

43. Hester v. Western Life & Accident Ins. Co., 67 Mont. 286, 290, 215 P. 508, 509 (1923).

44. Outlook Farmers' Elevator Co. v. American Sur. Co., 70 Mont. 8, 25, 223 P. 905, 911 (1924).

45. Farleigh v. Kelly, 28 Mont. 421, 433, 72 P. 756, 760 (1903).

46. DeAtley v. Streit, 81 Mont. 382, 390, 263 P. 967, 971 (1928).

47. Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 454, 19 P.2d 637, 639 (1933).

48. Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 439, 357 P.2d 4, 11 (1970).

49. 56 F.R.D. 183, 200 (1972). (This citation is to the original Rule 106 which later was renumbered Rule 105).

50. 391 U.S. 123 (1968).

E. *Completeness Rule*

Rule 106, Remainder of or Related Acts, Writings, or Statements, is the completeness rule. It is based on two considerations: that a misleading impression can be created when matters are presented out of context; and that attempts to explain or repair the damage done by the out-of-context impression are usually inadequate.[51] In order to remedy the situation the Rule combines the Federal Rule with Montana law[52] to admit into evidence an entire act, writing or recorded statement, or series thereof, when parts of such items create an unfair impression. In addition to requiring immediate introduction at the request of a party, the Rule allows the adverse party to inquire into or introduce any other part of such items, and cross-examine or further develop matters covered by the Rule. Under case law, the matters admitted to make a complete impression need not be independently admissible.[53]

III. Articles II and III Judicial Notice and Presumptions

Articles II and III provide convenient means of placing facts or law in evidence without formal proof. Article II, Judicial Notice, provides parties and the court with a tool for establishing facts which neither side nor an objective observer would contend are susceptible of being false. Because there would be no contest as to the existence of these types of facts, it is of tremendous time-saving value to allow the court to recognize and establish such facts as proven. The same can be said for laws, and Article II also provides an expansion in the judicial notice of law. Article III, Presumptions, is concerned with the procedural aspect of presumptions, or their effect, and not with any of the particular existing presumptions. Presumptions provide a short-cut to the normal process of proof of facts by providing that once certain basic facts are proved a presumption of fact occurs and the matter is established, unless there is a contest as to either the basic or presumed facts. Again, lessening the steps required to prove facts is a time-saving and convenient tool.

A. *Judicial Notice of Facts*

Rule 201(a) rejects the Federal classification of "adjudicative" and (by implication) "legislative" facts which categorize the types

51. Advisory Committee's Note to Fed. R. Evid. 106, 56 F.R.D. 183, 201 (1972). (This citation is to the original Rule 107 which later was renumbered Rule 106).

52. Commission Comment to Mont. R. Evid. 106.

53. Hulse v. Northern Pac. Ry., 47 Mont. 59, 63 130 P. 415, 416 (1913); McConnell v. Combination Mining & Milling Co., 30 Mont. 263, 293, 76 P. 194, 202 (1904).

of facts that may be judicially noticed by simply providing that all facts may be judicially noticed, leaving further refinement to subdivision (b). The notion of "adjudicative" and "legislative" facts has been advanced by Professor Kenneth C. Davis[54] for decades in an attempt to analyze the types of facts allowed to be judicially noticed in appellate court decisions. Broadly speaking, adjudicative facts are those which must be proven in ordinary litigation, or "the facts of the particular case."[55] "Legislative" facts are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."[56]

One problem with this analysis is deciding whether a fact should be included within the "adjudicative" category and so be governed by Rule 201, or considered a "legislative" fact and not governed by the Rules of Evidence at all. The Commission felt that adopting the Federal Rule would lead to needless litigation concerning a rule which should simplify the judicial notice process and not encumber it. This feeling is verified by the fact that nineteen federal decisions have dealt with Federal Rule 201 since it was enacted.[57] Further, the Federal Advisory Committee has been criticized by the originator of the terms, Professor Davis, because it

> assumes that all facts either (a) pertain to the parties or (b) are used for law making. But the facts of life are more complex. Some facts that do not pertain to the parties are used for purposes other than law making.[58]

The Commission agreed with this analysis, not only as a criticism of the Federal Rule, but also as a reason for not using Professor Davis' analysis. Therefore, as the Commission Comment to Montana Rule 201 states:

> The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

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54. DAVIS, ADMINISTRATIVE LAW TEXT § 150.3 (1959); Davis, *Judicial Notice*, 1969 LAW & SOC. ORD. 513; Davis, *"A System of Judicial Notice Based on Fairness and Convenience,"* PERSPECTIVES OF LAW 69 (Pound, ed. 1964); Davis, *Judicial Notice*, 55 COL. L. REV. 945 (1955); Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949); Davis, *An Approach to the Problem of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

55. Advisory Committee's Note to FED. R. EVID. 201, 56 F.R.D. 183, 202 (1972).

56. *Id.*

57. FEDERAL RULES OF EVIDENCE NEWS, Cumulative Table of Cases, Vol. 1, 76-1, Vol. 2, 77-1 (Schmertz, ed. 1976, 1977).

58. Davis, *Judicial Notice*, 1969 LAW & SOC. ORD. 513, 525 n. 43.

Subdivision (b) of Rule 201 represents a change in Montana's approach for taking judicial notice of facts because it sets out two broad categories rather than attempting to list specific facts which may be judicially noticed.[59] The first category is concerned with facts "generally known within the territorial jurisdiction of the trial court" and repeats in different terms the case law approach allowing judicial notice of facts of "common knowledge."[60] It is important to note that this category is not intended to include facts personally known to the trial judge.[61] The second category is concerned with facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" and is intended to allow standard reference books, reports, and the like to be judicially noticed. This is also consistent with existing Montana law.[62]

As the Commission Comment to Rule 201(b) indicates, if a fact is one that is subject to a reasonable dispute, judicial notice is not the proper method of entering that fact in evidence, for it should be proven like any other disputed fact through testimony, documentary evidence or other means. It is important to remember that judicial notice is intended to save time and expense by not requiring formal proof for only *indisputable* facts.

Subdivisions (c) through (g) of Rule 201 are concerned with procedural aspects of judicial notice. A court is allowed discretion to take judicial notice whether requested or not, but must take judicial notice if requested by the party and supplied with the necessary information. Parties may contest the taking of judicial notice of particular facts in that they are not within the standards of subdivision (b). Judicial notice may be taken at any stage of any proceeding, from pretrial conference through appellate determination. Finally, in civil cases the jury is to be instructed to accept as conclusive facts which are judicially noticed, but in criminal cases the jury is to be instructed that it may but is not required to accept such facts as conclusive in order to safeguard the accused's right to trial by jury.

B. *Judicial Notice of Law*

Rule 202 is concerned with judicial notice of law. It is an original provision which parallels Rule 201. The Advisory Committee's

59. *See* R.C.M. 1947, § 93-501-1 for such a list.

60. *See, e.g.*, Clark v. Worral, 146 Mont. 374, 380, 406 P.2d 822, 825 (1965); State ex rel. Schultz-Lindsey v. Board of Equalization, 145 Mont. 380, 401, 403 P.2d 635, 646 (1965).

61. *See* Holtz v. Babcock, 143 Mont. 341, 389 P.2d 869, *rehearing denied* 143 Mont. at 373, 390 P.2d 801, 802-03 (1964).

62. R.C.M. 1947, §§ 93-501-1(8) and 93-1101-8.

Note to Federal Rule 201[63] concludes that judicial notice of law is a matter for rules of procedure, not rules of evidence. The Commission felt that existing Montana law was in need of reform, that proof of law can be seen as a proper subject of rules of evidence, and therefore, that it should draft this Rule to codify, clarify and reform the law on judicial notice of law. This Rule is intended to be consistent with and complementary to Rule 9 (d), Montana Rules of Civil Procedure, requiring ordinances and statutes to be pleaded as special matters.[64]

Rule 202(a) indicates that the Rule governs judicial notice of law, which must be distinguished from judicial notice of fact under Rule 201. Rule 202(b) presents a list of the kinds of law allowed to be judicially noticed, but it is not an exclusive list, for the rule begins: "Law includes but is not limited to the following. . . ." Much of the list incorporates existing Montana statutes and cases on judicial notice of law, but makes changes in several areas of case law. For example, courts are now allowed to take judicial notice of ordinances of city or municipal governments. The Commission felt this a sensible and convenient change, particularly because the party using the ordinance is required to plead it as a special matter under Rule 9(d), Montana Rules of Civil Procedure, and ordinances are readily available. There is an expansion to permit judicial notice of records of courts of record from other jurisdictions. Courts, including the supreme court, may now take judicial notice of local court rules because the supreme court is now promulgating rules of court and local court rules are available in any county courthouse. These areas represent a change in Montana law in that cases have held it improper to take judicial notice of such law.[65] Two new areas included in the list allow judicial notice of international law and maritime law. The Commission concluded that the list is sufficiently inclusive to allow a court to take judicial notice of any law. Again since the list is not exclusive, room for development is present.

The last five subdivisions of the Rule closely parallel Rule 201 and incorporate the Uniform Judicial Notice of Foreign Law Act procedural sections[66] to ensure that all parties are aware of and hopefully in agreement with a court's taking judicial notice of law. No change from existing Montana law is intended by these provisions. Among them are provisions allowing the court to take judicial notice of any of the law listed in subdivision (b) except the first

63. 56 F.R.D. 183, 207 (1972).
64. Commission Comment to MONT. R. EVID. 202(a).
65. State ex rel. Coleman v. District Court, 120 Mont. 372, 377, 186 P.2d 91, 94 (1947).
66. R.C.M. 1947, §§ 93-501-2 to 501-8.

clause which is mandatory, allowing the court to inform itself of any law in such manner as it deems proper and to call upon counsel for aid, allowing the parties to require the court to take judicial notice of law when the party requests it and supplies the necessary information, and a provision allowing the parties an opportunity to be heard on the propriety of the court's taking judicial notice of any particular law. The Rule also provides that judicial notice of law may take place at any stage of the proceedings and if a party presents evidence of a law of another jurisdiction in order that it be introduced or judicially noticed, it must give reasonable notice of its intention to do so. Finally, the Rule provides that the determination of law shall be made by the court, except as otherwise provided, referring to the Montana constitutional provision on libel.[67]

C. *Presumptions*

Article III, Presumptions, contains two rules, one on presumptions in general and the other or the applicability of federal presumptions in state cases. It does not contain any presumptions itself, but instead indicates how they are to operate.[68]

Rule 301(a) defines presumptions. The Federal Rule does not contain such a definition because of the Advisory Committee's view that presumptions must operate differently in criminal cases than in other contexts.[69] Whether or not this is a valid reason for not including a definition, it appears that many commentators felt there was a definite need for some clarification. As one text warns: "presumption is the slipperiest member of the family of legal terms."[70] It is apparent that the matter is left to general law,[71] but this does not answer such questions as whether the rule applies to inferences[72] or conclusive presumptions,[73] or whether previously offered definitions from the Model Code (1942) or Uniform Rules (1954) may be used.[74] The Commission determined that it is better to define presumptions as well as to state their effect in order to clarify basic terms and keep all the law of evidence in one place whenever possible.

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67. MONT. CONST. art. II, § 7 provides that in libel and slander actions the court shall aid the jury in determining the law and facts.

68. MONT. R. EVID. Table D lists nearly all the presumptions existing under Montana law.

69. Advisory Committee's Note to FED. R. EVID. 303 (not enacted), 56 F.R.D. 183, 213 (1972).

70. MCCORMICK, *supra* note 22, at 802.

71. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 14 (1973).

72. *Id.*

73. Comment, *Presumptions Under the Proposed Federal Rules of Evidence*, 24 WAYNE L. REV. 135, 154 (1969).

74. Farnoff, *Presumptions: The Proposed Federal Rules of Evidence*, 24 ARK. L. REV. 401, 403 (1971).

Montana Rule 301(a) defines a presumption as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding." The definition thus indicates that presumptions differ from inferences in that they *must* be made, while inferences are logical thought processes which *may* be made. It also points out that a presumption is an assumption, rather than a deduction, so that presumptions based on public policy as well as logic are included within the definition.[75]

The basic elements of a presumption are its basic fact and its presumed fact.[76] A basic fact is "the fact or group of facts giving rise to a presumption."[77] A presumed fact is the "assumption of fact" found in the definition in Rule 301(a). An example is helpful in understanding these terms. In the presumption "[t]hat a letter duly directed and mailed was received in the regular course of the mail,"[78] the basic facts are that the letter was duly directed and mailed, for these facts give rise to the presumption. Here the presumed fact or presumption is that the letter was received. A clear understanding of these terms is important when considering the classification and effect of presumptions covered in Rule 301(b).

That subdivision classifies two different kinds of presumptions, conclusive and disputable. A conclusive presumption is a presumption in which the presumed fact may not be controverted, that is, either challenged or disproven by contrary evidence. The basic fact of a conclusive presumption, or the facts giving rise to it, may be challenged so that the conclusive presumption does not arise. A disputable presumption is simply a presumption in which either the basic or presumed facts may be controverted.

Rule 301(b), as well as the Federal and Uniform Rules 301, also states the effect of presumptions. In order to fully understand each of these rules, it is necessary to examine the three major theories of presumptions, each of which is followed by the three different Rules. Under each theory the basic facts giving rise to the presumption must be introduced and accepted as established. If evidence is introduced challenging the existence of a basic fact, a question is presented concerning whether a presumption exists at all, and not what effect it has. Under the definition provided in Rule 301(a) and all three theories, if the basic facts appear and there is no evidence

75. For a more complete discussion of this definition see Commission Comment to MONT. R. EVID. 301(a) and Clarke, *Statutory and Common Law Presumptions in Montana*, 37 MONT. L. REV. 91, 92 (1976).

76. MODEL CODE OF EVIDENCE rule 701 (1942).

77. *Id.*

78. R.C.M. 1947, § 93-1301-7(24).

introduced contrary to the presumed fact that the letter was received, the trier of fact must accept the presumed fact because this is the "assumption of fact the law requires to be made." It is reasonable to suggest that if the basic facts do not exist, the jury should be told to disregard the presumed facts. If there is a question as to the existence of the basic facts, the jury should probably be instructed that if it finds the basic facts it must find in favor of the presumption.[79] In the following discussion, it must be assumed that the basic facts have been established.

The theories differ when evidence is presented contrary to the presumed fact. It is apparent that the effect of presumptions is related to the burden of proof. Under the two major theories adopted by the Federal and Uniform (1974) Rules, the shifting of the two burdens of proof is the sole effect of presumptions. Under Federal Rule 301, the effect of a presumption is to shift the burden of producing evidence contrary to the presumption. Once evidence is introduced contrary to the presumption, it disappears. Accordingly, this theory is known as the "bursting bubble" or "disappearing presumption" theory, advocated by Professors Thayer and Wigmore.[80] From the viewpoint of the party against whom the presumption operates, this theory requires that if the party introduces no evidence contrary to the presumed fact, the jury will be instructed to accept it. If the party introduced evidence contrary to the presumed fact, there will be no presumption, there will be no instruction, and the jury will weigh the contrary evidence against the basic facts, which have given rise to a mere inference.[81] It is apparent that this theory gives the weakest effect to presumptions.[82]

Under Uniform Rule (1974) 301, the effect of a presumption is to shift the burden of persuasion, or proving the nonexistence of the presumed fact, to the party against whom the presumption operates. From the point of view of the party against whom the presumption operates, this theory requires the party to present a preponderance of evidence contrary to the presumption and the jury to be instructed to that effect or the presumption will be accepted as established.

Following Montana case law,[83] Rule 301(b) recognizes the rule that presumptions have the weight and effect of evidence. Under

79. Judicial Council Committee's Note to WIS. STAT. ANN. § 903.1 (West). The relevant portion of the Note may also be found in 56 MARQ. L. REV. 155, 193 (1973). The Marquette Law Review devoted all of its Vol. 56, No. 2 to the then "Proposed Wisconsin Rules of Evidence."

80. MORGAN, *supra* note 35, at 34-35.

81. 1 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE 300-04 (1975).

82. Assembly Committee on Judiciary Comment to CAL. EVID. CODE § 606 (West).

83. Lewis v. New York Life Ins. Co., 113 Mont. 151, 162, 124 P.2d 579, 583 (1942).

this rule, the trier of fact is instructed that the presumed fact is to be weighed as evidence against the contrary evidence to determine by a preponderance of evidence whether it will believe the existence of the presumed fact or contrary evidence. An exception to this rule exists when the evidence contrary to the presumed fact is so overwhelmingly against it, then as a matter of law the judge can remove the presumption from the jury's consideration.[84] The difference between the Uniform (1974) and Montana Rule is that in Montana the presumption is viewed as evidence rather than an assumption which can be overcome by contrary evidence. The difference is only slight, and relates to instruction of the jury. It could perhaps make a difference in appellate review of the evidence in the case.

The final subdivision of Rule 301, dealing with inconsistent presumptions, provides a sensible solution to this difficult problem, in that presumptions of greater policy weight are to be considered over those with lesser policy but if of equal policy weight, then they are disregarded.

Rule 302 addresses the unique situation of having a federally recognized presumption applying in Montana courts. If this occurs, the presumption must be given the same effect as it is given in Federal courts. The determination of whether a presumption is a "federal" presumption is made on the basis of whether a federally created right is at issue. If a presumption is a substantive element of the claim or defense, the federal procedural law applies.[85] This means that Federal Rule 301 and the disappearing presumption theory would apply.

IV. Article IV Relevancy and Its Limits

In the scheme of the Rules of Evidence, Article IV is the first dealing with major rules of evidence, the first three articles being general provisions and means of introducing evidence other than by formal proof. This article is also one of the most important because in determining the admissibility of any evidence, the first question is always whether the evidence is relevant.[86] Problems of relevancy are usually concerned with circumstantial evidence, or evidence from which the fact to be proved must be inferred or presumed, because there is usually no question that direct testimony of a fact is relevant, assuming that fact needs to be proven in the action.

Article IV can be divided into two parts. The first consists of three general rules designed to allow the trial judge flexibility in

84. Nichols v. New York Life Ins. Co., 88 Mont. 132, 139, 292 P. 253, 255 (1930).
85. Wright, The Law of Federal Courts, § 45 at 174 (2d ed. 1970).
86. Thayer, Preliminary Treatise on Evidence at the Common Law 269 (1898).

determining relevance and whether evidence, if relevant, should be excluded because its probative value is outweighed by other considerations. The second contains eight rules which determine whether certain evidence should be admissible and have not left admissibility to the discretion of the trial judge. These latter rules are based upon case precedent and public policy concerns.[87]

A. *Definition of Relevance; Admissibility Generally*

Rule 401 provides a definition of relevance which accomplishes three ends: it states a test of relevance; it combines the concept of materiality with relevance; and it ensures that evidence relating to the credibility of witnesses or hearsay declarants is relevant. Before discussing each of these ends, it is helpful to examine the Advisory Committee's view of relevance:

> Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?[88]

This relationship between the item of evidence and proposition to be proved can also be referred to as the probative value of the evidence and is synonymous with relevance.[89]

The definition in Rule 401 states the test of relevance as follows: "Relevant evidence means evidence having any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence." This test of relevance is one that may be labeled "logical relevance" and is concerned only that logic and experience tend to show that the item of evidence is relevant. This view was first announced by Professor Thayer[90] and can be contrasted with Professor Wigmore's view that evidence must also be legally relevant or have a plus value relating to the admission of a similar item of evidence established by case precedent.[91] There are two differences between these approaches: first, in the process of admitting evidence, and second, in the test of probative value. Thayer's process is to determine whether evidence is probative according to logic and experience and then to determine whether some other rule of evidence would exclude it.[92] Wigmore's process first determines whether the evidence is probative according to logic and

87. Advisory Committee's Note to FED. R. EVID. 401, 56 F.R.D. 183, 215 (1972).
88. *Id.*
89. MCCORMICK, *supra* note 22, at 433; Slough, *Relevency Unraveled*, 5 U. KAN. L. REV. 1, 1 (1956).
90. THAYER, *supra* note 86, at 264.
91. WIGMORE, *supra* note 21, § 12 at 298, § 28 at 409.
92. THAYER, *supra* note 86, at 264.

experience, then whether the evidence should be admitted according to previous rulings by courts and finally determines whether some other rule of evidence would exclude it.[93]

Wigmore's approach has been criticized because "legal reasoning" cannot be better than logic itself, because it demands the trial judge adhere to a vast number of cases when making rulings from the bench,[94] and because it can lead to confusion between admissibility of evidence and sufficiency of evidence to allow a case to go to a jury.[95] This confusion can result in requiring each item of evidence to appear in and of itself sufficient to allow a finding of the proposition by the jury, or to require a higher degree of probative value for an item to be relevant.

Rule 401, which adopts Thayer's approach, rejects all this and requires only that evidence have probative value according to logic and experience. There are no degrees of relevancy: "a fact is relevant or irrelevant; there can be no middle ground."[96] This test of relevance is less stringent than Wigmore's, and requires only a tendency to prove the existence or nonexistence of a fact. As the Advisory Committee's Note indicates, any more stringent requirement would be unworkable and unrealistic.[97] Therefore, when a witness testifies, he is not expected to prove each entire proposition for which he presents any item of evidence; "a link in the chain should be enough."[98] This is consistent with tests of relevancy expressed by Montana cases.[99]

The second accomplishment of the definition occurs with the language "fact that is of consequence to the determination of the act . . ." which has the effect of combining materiality with relevance. The distinction between relevance and materiality is often difficult to make in actual practice. However, it can be stated generally that relevance is concerned with whether a particular item of evidence tends to prove a proposition at issue in the case as determined by logic and experience, while materiality is concerned with whether a proposition itself is properly provable in the case as determined by the pleadings, procedural rules and substantive law. The reason the definition combined the two concepts is that "it has the advantage of avoiding the loosely used and ambiguous word 'material.' "[100] An

93. WIGMORE, *supra* note 21, § 12 at 298.

94. Slough, *supra* note 89, at 11.

95. Weinstein & Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 GA. L. REV. 43, 56 (1969).

96. Slough, *supra* note 89, at 2.

97. Advisory Committee's Note to FED. R. EVID. 401, 56 F.R.D. 183, 216 (1972).

98. Peterfund, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence for U.S. District Courts: Article IV*, 25 REC. 80, 81 (1970).

99. *E.g.*, Rhodes v. Weigand, 145 Mont. 542, 546, 402 P.2d 588, 590 (1965).

100. Advisory Committee's Note to FED. R. EVID. 401, 56 F.R.D. 183, 216 (1972).

example of a fact not of consequence to the action would be the rape victim's character in such a prosecution, as ordinarily excluded by statute.[101]

The third accomplishment of the definition occurs in its second sentence, which indicates that relevant evidence includes "evidence bearing upon the credibility of a witness or hearsay declarant." This was added to the Federal definition to prevent the exclusion of this type of evidence under a technical interpretation of the definition in Rule 401 and mandate of Rule 402 to admit relevant evidence but exclude irrelevant evidence.[102] It is possible to view evidence relating to credibility as having no tendency to prove facts of consequence to the action,[103] but this sentence solves any such problems.

It should also be noted that the definition of relevance is intended to include demonstrative evidence or physical objects as evidence which enable the court and jury to understand the case. The Advisory Committee's Note and Commission Comment make this clear and courts should allow all such evidence.[104]

Rule 402 provides the basic rule that all relevant evidence is admissible, with exceptions, and all irrelevant evidence is not admissible, with no exceptions. The latter part of the Rule, that irrelevant evidence is not admissible, has been called "a presupposition involved in the very conception of a rational system of evidence. . . ."[105] The exceptions to the rule that all relevant evidence is admissible are provided by these Rules, statutes, and the United States and Montana Constitutions. Any rule of evidence providing for exclusion has the effect of excluding potentially relevant evidence. Certainly there are statutes which exclude relevant evidence.[106] Finally, the constitutional provisions providing exclusion relate to the exclusionary rule and statements elicited in violation of right to counsel.[107]

Rule 403 is the first rule excluding relevant evidence. It excludes evidence on the basis that the probative value of the evidence is substantially outweighed by its prejudicial, confusing, or time wasting effect. Obviously this rule must be applied by the trial judge and places heavy reliance on the judge's discretion. The common law has long recognized the need for flexibility in determining admissiblity when balancing probative value and need for evidence against harmful effects it might cause to the jury, because no num-

101. R.C.M. 1947, § 94-5-503(5) (Supp. 1977).
102. Commission Comment to MONT. R. EVID. 401.
103. *Id.*
104. Advisory Committee's Note to FED. R. EVID. 401, 56 F.R.D. 183, 216 (1972).
105. THAYER, *supra* note 86, at 264.
106. *See* Commission Comment to MONT. R. EVID. 402 for examples.
107. *See id.* for citations to constitutional provisions and cases.

ber of rules could possibly meet all the situations occurring during trial.[108]

An important aspect of the rule is what grounds may be used to exclude relevant evidence. It is apparent that the rule divides its "countervailing elements" into two groups: dangers and considerations.[109] In the "dangers" group are included elements which threaten the jury trial process, specifically unfair prejudice, confusion of the issues, and misleading the jury. As the Commission Comment notes, unfair prejudice is intended to convey the usual meaning of prejudice, but some further explanation is helpful. The Advisory Committee states that unfair prejudice means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[110] Confusion of the issues arises most frequently when collateral issues are raised, creating a trial within a trial, and sidelining the main issues to be decided in the case.[111] Misleading the jury is similar to confusion of issues, but relates to specific evidence which could be misunderstood, such as tests or experiements with subtle differences from the actual events on trial, and so the jury is misled as to the meaning of the evidence.[112] In the "considerations" group are the latter three elements of the rule, undue delay, waste of time, and needless presentation of cumulative evidence. Again, some distinction is helpful. Undue delay might result from needless jury views of the premises or scene of the incident or from time spent setting up a demonstration which proves very little. Waste of time might result from offering evidence on conceded issues. Cumulative evidence means offering several witnesses to prove a point when two or three would be sufficient.[113] The Advisory Committee indicates that it was not included because a continuance, not exclusion of the evidence, is a more appropriate remedy.[114] As the Commission Comment to Montana Rule 403 indicates, this Rule is consistent with Montana statutes and cases.

B. *Character Evidence*

Two considerations which are helpful to the analysis of problems connected with character evidence are the purpose for which such evidence is used and the manner in which it is proven.[115] There are two purposes for which character evidence may be used. Charac-

108. Slough, *supra* note 89, at 13.

109. Schmertz, *Relevancy and Its Policy Counterweights: A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1, 5 (1974).

110. Advisory Committee's Note to FED. R. EVID. 403, 56 F.R.D. 183, 218 (1972).

111. Schmertz, *supra* note 109, at 6.

112. *Id.*

113. *Id.*

114. Advisory Committee's Note to FED. R. EVID. 403, 56 F.R.D. 183, 218 (1972).

115. McCormick, *supra* note 32, at 442-43.

ter may be an element of a crime, claim, or defense and is said to be in issue, or character evidence may be introduced to create an inference that a person acted in conformity with the proven character trait and is said to be used circumstantially.[116] There are three means of proving character: reputation evidence as to the existence of a character trait, opinion testimony as to the existence of a character trait, and specific acts reflecting a character trait. These types of proof are listed "in order of their pungency and persuasiveness" and their "tendency to arouse undue prejudice, to confuse and distract, to engender time-consuming side issues and to create risk of surprise."[117] That is, specific acts most directly show a character trait but may not be truly representative and are likely to lead to a trial within a trial as to the existence of a character trait, while this is less likely with the other two methods.

Rule 404 covers problems of admissiblity of character evidence and so deals with the first consideration, the purpose for which character evidence may be used. Rule 405 covers problems of method of proof of character evidence and so deals with the second consideration.

Rule 404(a) gives the three limited instances in which character evidence may be used circumstantially. First, to prove that he did not commit the crime for which he is on trial, the accused may present evidence of his pertinent good character trait and the prosecution may rebut this with evidence of his bad character. Second, to prove that he acted reasonably or was not the first aggressor, the accused may present evidence of a pertinent character trait (probably violent behavior) of the victim. The prosecution may rebut such evidence, and in certain cases may rebut any evidence that the victim was the first aggressor with evidence of the victim's peaceful character. Third, to prove the credibility of a witness in any case, civil or criminal, any party may present character evidence relating to truthfulness or untruthfulness as provided in Rule 608. Circumstantial use of character evidence is limited to these instances because often its probative value is limited when balanced against prejudicial impact.[118] The limitations recognized in this rule are consistent with Montana law. The Commission Comment indicates that with the exception of character of witnesses, circumstantial use of character evidence is limited to criminal cases. Allowing the prosecution to use evidence of peaceful character traits of the victim to rebut any evidence, not just evidence that he was the first aggressor, is new to Montana law.

116. Advisory Committee's Note to FED. R. EVID. 404(a), 56 F.R.D. 183, 220 (1972).
117. MCCORMICK, *supra* note 22, at 443.
118. Advisory Committee's Note to FED. R. EVID. 404(a), 56 F.R.D. 183, 220-21 (1972).

Rule 404(b) is concerned with a special kind of character evidence, evidence of the commission of other crimes by the accused. This subdivision is consistent with the universally recognized rule that "evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it."[119] This is in conformity with Rule 404(a) limiting the circumstantial use of character evidence. There is a requirement for a subdivision dealing with other crimes because, despite the prohibition implicit in subdivision (a) and expressed in subdivision (b), this type of evidence may be used for purposes of other than implying that the accused committed the crime for which he is on trial. The second sentence of subdivision (b) indicates some of these purposes, but use of the language "such as" denotes that the list is not exclusive. The purposes for which other crimes may be proven, as listed in the rule, include "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

This subdivision is consistent with existing Montana law, but is a change from earlier practice. At one time Montana had the rule that evidence of other crimes was not admissible for any purpose.[120] This was eventually overruled and the usual exceptions recognized.[121] However, it should be noted that one recent case indicated that the admissibility of other crimes should not be automatic and that courts should weigh the probative value of the other crimes evidence against the prejudice bound to result from this type of evidence, a balancing similar to that under Rule 403.[122]

Rule 404(c) is original and not found in the Federal Rules. It is apparent that the Advisory Committee recognized character in issue from their Note to Rule 404(a) and treatment in Rule 405(b); however, they chose not to treat character in issue in Rule 404, dealing with admissiblity of character evidence, because they did not believe a relevancy problem existed.[123] However, the Commission concluded that a rule on the admissibility of character evidence should include this subdivision stating that when a person's character is an element of a claim, charge, or defense it is admissible. A question left unanswered by Rule 404(c) is what places character in issue: while an attack may be accomplished in the pleadings[124] or presenta-

119. *Id.* at 221.

120. State v. Searle, 125 Mont. 467, 471, 239 P.2d 995, 997 (1952) (any other crime); State v. Sauter, 125 Mont. 109, 144, 232 P.2d 731, 731-32 (1951) (other sex crimes).

121. State v. Jensen, 153 Mont. 233, 238, 455 P.2d 631, 633-34 (1969); State v. Tully, 148 Mont. 166, 169, 418 P.2d 549, 550 (1960).

122. State v. Skinner, 163 Mont. 58, 64, 515 P.2d 81, 84 (1973).

123. Advisory Committee's Note to FED. R. EVID. 404(a), 56 F.R.D. 183, 220-21 (1972).

124. Puutio v. Roman, 79 Mont. 226, 229, 255 P. 730, 731 (1927).

tion of evidence, evidence of the good character of a party is not allowed unless that character is attacked.[125]

Rule 405 is concerned with methods of proving character. Subdivision (a) covers the first two methods. The first, which is the most usually accepted and recognized in Montana, is proof of character by reputation. This method relied upon what others in the community say about a person's particular character trait and is presented through the testimony of a person who must be shown to have lived in the community and to have heard reports about the character trait in question.[126] This method of proof has lost some of its validity because in modern society the likelihood that a person has a reputation for certain character traits is much less than in times past.[127] In fact, the absence of any bad reports of a person's character has been allowed to give rise to the inference that the person is of good character.[128] These considerations led the Commission and the Advisory Committee to allow the second method of proof, opinion evidence. This allows proof of character by the testimony of the person's acquaintances based upon their own personal opinions, not the reputation or opinion of the community as a whole. This is a much more realistic view of what a witness testifies to when presenting character testimony, for many witnesses testifying to good character through reputation are relying on their own opinions. This is an expansion of existing Montana law, as indicated in the Commission Comment to this rule. The second sentence of Rule 405(a) allows specific instances of conduct to be inquired into on cross-examination of character witnesses and is intended to allow the adverse party to test either the reputation, knowledge, or opinion of the witness by reports contrary to their testimony. This codifies the rule of *Michelson v. United States*[129] and is recognized in Montana.[130]

In contrast to this provision, Rule 405(b) allows specific instances of conduct to be used as a method of proof of character traits, but only where character is in issue, or the character of the victim relates to the reasonableness of force used by the accused. In the first situation, use of this method is justified because if character is in issue, it is not a side issue and there is no danger of confusing the

125. Meinecke v. Skaggs, 123 Mont. 308, 311, 213 P.2d 237, 239 (1949); *See* R.C.M. 1947, § 93-1901-13.

126. State v. Moorman, 133 Mont, 148, 152, 321 P.2d 236, 238-39 (1958).

127. Slough, *supra* note 89, at 413.

128. Matusevitz v. Hughes, 26 Mont. 212, 217, 67 P. 467, 468 (1902); State v. Shafer, 22 Mont. 17, 18, 55 P. 526, 527 (1898).

129. 335 U.S. 469 (1948).

130. State v. Moorman, 133 Mont. 148, 153, 321 P.2d 236, 239 (1958).

jury.[131] The second situation is a recognition of the unique Montana case law allowance of the use of this method by the defendant, noted in the Commission Comment.

C. *Habit; Routine Practice*

Rule 406 is concerned with habit and routine practice. The Advisory Committee's Note to Federal Rule 406[132] emphasized the distinction between habit and character evidence. The Commission decided that a distinction should be made between these terms because character evidence is generally excluded while habit evidence is generally admitted, and further because the two terms are very often confused. Therefore, Rule 406(a) presents the following definition of the terms habit and routine practice: "A habit is a person's regular response to a repeated specific situation. A routine practice is a regular course of conduct of a group of persons or an organization." Thus, a routine practice is the habit of a group. On the other hand, character is "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."[133] An example pointing out the differences may be helpful. In an action for the wrongful death of X at a railway crossing, the plaintiff offers two types of evidence; first, that X was a careful, cautious man and second, that X always stopped and looked carefully before crossing the particular railway crossing at which he was killed. The first type of evidence is character evidence offered circumstantially to show that on the particular occasion X was careful; this should be excluded because it is not one of the permissible uses under Rule 404. However, the second type of evidence is a regular response to a repeated specific situation and so is habit evidence and admissible under Rule 406.[134] Other notions of habit are that it is "semi-automatic, almost involuntary, and invariable specific responses to a fairly specific stimuli."[135] The reason habit evidence is admissible is the reliability with which an habitual response would occur: it is highly likely that the person acted in conformity with the habit during the event which is basis of the case.[136] However, it is much less likely that a person would act in conformity to a character trait in the same situation, because the response is not as automatic, and certainly not involuntary. For this reason it is not generally admissible.

131. Advisory Committee's Note to FED. R. EVID. 405, 56 F.R.D. 183, 222 (1972).
132. 56 F.R.D. 183, 223 (1972).
133. MCCORMICK, *supra* note 22, at 462.
134. MODEL CODE OF EVIDENCE rule 307, Comment at 190 (1942).
135. Schmertz, *supra* note 105, at 14.
136. MCCORMICK, *supra* note 22, at 463.

Rule 406(b) simply provides that habit evidence is admissible, whether or not corroborated and whether or not there were eyewitnesses. The problems of corroboration and eyewitnesses probably arose because courts did not fully accept habit evidence or confused it with character evidence.[137] The Advisory Committee views corroboration as a requirement going to the sufficiency or weight of the evidence, not its admissibility.[138] In some jurisdictions, the eyewitness requirement allowed the presence of an eyewitness to prevent the admission of habit evidence, probably because it was unnecessary. Yet eyewitness testimony is not so accurate or unbiased that adverse evidence should be excluded.[139] Thus the Rule admits habit evidence despite eyewitnesses.

Rule 406(c) is the equivalent to Federal Rule 406(b) and indicates that habit may be proved by opinion or by specific instances of conduct sufficient to warrant a finding of habit. The criterion for determining the existence of a habit is that the person responded to the specific situation a sufficient number of times to make the response a regular one.[140] Evidence showing that the person has not absolutely and invariably acted in conformity with the habit may go to the weight of the evidence if it is not sufficient to exclude the evidence as not qualifying as a habit.[141] Care should be taken so that a foundation unsuccessfully attempting to prove habit does not persuade the jury that the habit did exist.

The remaining rules in Article IV have been classified as rules of express or implied admissions. They deal with evidence of a party's conduct which may indicate his lack of belief in his own case.[142] In fact, although the admission theory does not apply to all of these rules, an important public policy consideration does exist for each of them and is the reason for excluding evidence where it is offered for purposes contrary to that public policy. It is important to remember that when evidence is permitted under the exceptions to these rules, it may be used only for a limited purpose. Thus, under Rule 105 a cautionary limiting instruction is available to the party against whom the evidence is offered. It is also important to remember that the provisions of Rule 403 would exclude evidence, even though allowed by one of these rules, if its probative value is light and prejudicial impact great, particularly where there is other evidence to prove the same point. Without this caveat the exceptions could easily swallow the rules.

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137. Slough, *supra* note 89, at 450.
138. Advisory Committee's Note to FED. R. EVID. 406(a), 56 F.R.D. 183, 224-25 (1972).
139. Slough, *supra* note 89, at 446-47.
140. Lewan, *The Rationale of Habit Evidence*, 16 SYRACUSE L. REV. 39, 48 (1964).
141. MCCORMICK *supra* note 22, at 463.
142. Schmertz, *supra* note 109, at 15.

D. *Subsequent Remedial Measures*

Rule 407 excludes evidence of a repair made after an incident when this evidence is offered to prove negligence or culpable conduct. It is apparent that the subsequent repair is not always an admission of liability. Such conduct can be explained by the fact that the incident was an accident, the cause of which was nobody's fault, or there could have been contributory negligence or a high degree of comparative negligence, or the party could have made the repair simply out of humane impulses, wishing to prevent anyone else from being injured in the same fashion.[143] So, the admission theory is not a sufficient reason to exclude such evidence. The main reason for the existence of the rule is the public policy that repairs to dangerous conditions should be encouraged, or at least not discouraged by the threat that making of repairs will subject the repairing party to an unfavorable inference in litigation.[144]

The rule is intended to cover any type of action which would make the event less likely to occur and so covers everything from the typical repair of a faulty stairway to changes in operating rules or regulations, discharge of employees and installation of safety devices.[145] The rule excludes such evidence only when it is offered to show negligence or culpable conduct. The second sentence provides an open-ended list of exceptions, including proof of ownership, control, feasibility of precautionary measures, if controverted, or impeachment. An example of ownership or control is provided by a Montana case[146] in which evidence that the rock causing the plaintiff's injuries was removed from a certain street by the defendant city to prove that it had assumed control of the street and was under the obligation to keep it under repair. A further exception contained in Montana cases, but not listed in the Rule, is the admissibility of subsequent changes or repairs for the purpose of explaining conditions existing at the time of the accident.[147] The Advisory Committee's Note explains a condition for the use of these exceptions:

> The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the adverse party to lay the groundwork for exclusion by making an admission. Otherwise, the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.[148]

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143. Advisory Committee's Note to FED. R. EVID. 407, 56 F.R.D. 183, 225-26 (1972).
144. *Id.* at 226.
145. *Id.*
146. May v. City of Anaconda, 26 Mont. 140, 144, 66 P. 759, 761 (1901).
147. Pullen v. City of Butte, 45 Mont. 46, 53, 121 P. 878, 879-80 (1912); Teesdale v. Anschutz Drilling Co., 138 Mont. 427, 440, 357 P.2d 4, 11 (1960).
148. 56 F.R.D. 183, 226 (1972).

Finally, it is of interest that a rule equivalent to Rule 407[149] was applied in a products liability case in California.[150] That case held evidence of a change from aluminum to malleable iron in gearbox product was admissible because these cases do not require evidence of either negligence or culpable conduct, because the public policy of encouraging repairs by excluding such evidence does not apply to products liability case defendants who mass produce thousands of items and would be relieved of tremendous liability by making such changes, and because in products liability cases the emphasis shifts from the conduct of the defendant to the character of the product.[151] A contrary argument is that strict liability applies to all manufacturers, even small ones, and that these manufacturers should not be discouraged from making repairs.

E. *Compromise and Offers of Compromise, Payments of Expenses and Offers to Plead Guilty*

Rule 408 has the effect of excluding proof of compromise, or offers of compromise when offered to prove liability for or invalidity of a claim. Logically viewed, an offer is not necessarily an admission because it does not show the party believes his case is weak, only that he desires settlement. Yet as the amount of the compromise offer approaches the amount claimed, this suggestion becomes less valid.[152] Again, although this type of evidence may be relevant, the public policy which favors the settlement of disputes without resort to litigation demands its exclusion.[153] The second sentence of Rule 408 provides a change from the common law and a Montana case[154] by stating that evidence of conduct or statements made during negotiations is not admissible. The common law rule allowed admissions made during compromise negotiations to be used against a party if that admission did not refer to the settlement itself. Of course this did not encourage open and frank negotiations and was contrary to the policy of the rule. However, a party may not take advantage of this rule to try to immunize evidence by presenting it in negotiations because its third sentence provides that it does not exclude the content of such statements if the statements are otherwise discoverable. The final sentence provides exceptions to the Rule, allowing evidence of compromise for other purposes such as

149. CAL. EVID. CODE § 1151 (West).

150. Ault v. International Harvester Co., 13 Cal.3d 113, 117-18, 528 P.2d 1148, 1150, 117 Cal. Rptr. 812, 814 (1975).

151. *See* Sutkowski v. Universal Marion Corp., 5 Ill. App.3d 313, 319, 281 N.E.2d 749, 753 (1972) (holding a provision similar to Rule 407 also not applicable to these cases).

152. Advisory Committee's Note to FED. R. EVID. 408, 56 F.R.D. 183, 227 (1972).

153. *Id.*

154. Lenahan v. Casey, 46 Mont. 367, 379, 128 P. 601, 605 (1912).

to prove bias or prejudice of a witness, to negative a contention of undue delay, or to prove an effort to obstruct criminal proceedings.

Rule 409 excludes evidence of payment of expenses occasioned by an injury or occurrence. It differs from Federal Rule 409 which only includes evidence of offers to pay medical expenses. The reason for the difference lies in the different views of the Advisory Committee and the Commission. The Advisory Committee Note to Federal Rule 409[155] adopts the position that offers to pay medical expenses are made out of humane impulses, while the Commission concluded that whatever the reason for making such offers, humanitarian motives are seldom responsible. The Commission also felt that offers to pay are often coupled with admissions of liability and that valuable evidence may be lost by excluding such statements. The Advisory Committee followed similar reasoning in indicating that statements not related to offers of payment should be admissible under Federal Rule 409, even though contrary to similar provisions under Rule 408, because factual statements are "incidental in nature"[156] with offers of payment but not with offers of compromise. The Commission changed the Federal Rule to include offers of any kind, rather than those for medical expense, because they are inadmissible under Montana statutes.[157] The policy reason these payments are excluded is to encourage the settlement of claims by encouraging payment without such payment becoming evidence to be used against the person making it.

Rule 410 allows an accused in a criminal action to offer to plead guilty or nolo contendere or to withdraw such a plea without fear that this offer or withdrawal will be used against him in a trial on that charge. It is based upon the same considerations as Rule 408, on Compromise and Offers of Compromise, that making such a plea or offer to plea may have no bearing on the guilt or innocence of the accused and upon the policy of encouraging settlement of criminal cases. In addition, it is difficult to believe that an accused could receive a fair trial from a jury which knows that he has offered or withdrawn a plea of guilty.[158] The Rule includes provisions which prevent the accused from abusing this Rule and which allow use of statements for impeachment purposes or subsequent prosecution for perjury or false statement.

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155. 56 F.R.D. 183, 228 (1972).

156. *Id.*

157. R.C.M. 1947, §§ 93-2201-7 to 2201-10 (Supp. 1977).

158. Note, *Relevancy and Its Limits in the Proposed Federal Rules of Evidence*, 16 WAYNE L. REV. 167, 190 (1969).

F. *Liability Insurance*

The final Rule in Article IV deals with liability insurance, providing that evidence that a person was insured is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. The reasons for this rule are that a person's insurance coverage is not relevant nor is it an admission of fault,[159] and that it is highly likely that juries will misuse this information by increasing damage awards.[160] In fact, the results of one test in which an identical trial was shown to three different "mock" juries resulted in a $33,000 damage award when there was no mention of insurance, a $37,000 award when insurance was mentioned, and a $47,000 award when insurance was mentioned and a cautionary instruction given, even though the juries did not mention insurance in their deliberations.[161]

Montana law is unique in this area. While the rule is generally followed that a party's liability insurance is not admissible[162] and evidence that a party does not have insurance is equally inadmissible,[163] the rule is also followed that injection of the fact of insurance into a case can result in reversible error.[164] However, decisions by the Montana supreme court recognize exceptions to the reversible error rule where the insured party mentions insurance during voir dire,[165] where an admission of liability contains mention of insurance,[166] and where insurance is injected in the case by a witness for the insured party through a "voluntary, unresponsive, and incidental answer."[167] One case has indicated that the reversible error rule is used only after an examination of the facts and circumstances of the mention of insurance, and that reversal should not automatically follow.[168] As the Commission Comment to this rule indicates, there are several factors to be considered in determining whether to reverse, including whether the substantial rights of the insured party are affected and whether the judgment is excessive. These considerations take on significance in light of the second sentence of this Rule which permits evidence of insurance to be used for purposes other than to show liability, such as to demonstrate agency, ownership or control, or bias or prejudice of a witness. The Commission concluded that there is a legitimate use of insurance evidence under

159. McCORMICK, *supra* note 22, at 479.
160. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959).
161. *Id.*
162. Wilson v. Blair, 65 Mont. 155, 172, 211 P. 289, 295 (1922).
163. Doheny v. Cloverdale, 104 Mont. 534, 555, 68 P.2d 142, 148 (1937).
164. D'Hoodge v. McCann, 151 Mont. 353, 359, 443 P.2d 747, 750 (1968).
165. Francis v. Heidel, 104 Mont. 580, 588, 68 P.2d 583, 586 (1937).
166. Tanner v. Smith, 97 Mont. 229, 238, 33 P.2d 547, 511 (1937).
167. Meinecke v. International Transp. Co., 101 Mont. 315, 324, 55 P.2d 680, 682 (1936).
168. Francis v. Heidel, 104 Mont. 580, 588, 68 P.2d 583, 585 (1937).

exceptions in the Rule. With the considerations imposed by cases on the reversible error rule in mind, this new Rule can be used consistently with existing Montana law.

V. ARTICLE V PRIVILEGES

Article V, Privileges, reflects Congress' unique approach to Article V of the Federal Rules of Evidence. Congress changed Article V from one with rules on several of the individual privileges and rules applying to all privileges to a single rule applying the federal common law of privileges in federal civil and criminal cases and the state law of privileges in civil actions in which state law supplies the rule of decision. The Uniform Rules (1974) adopted the draft rejected by Congress. The Commission decided to adopt rules from the Uniform Rules which affect all privileges and clarify aspects of waiver of privilege and comment on claims of privilege. The reasons for the Commission's action are basically concerned with the unique nature of privileges in the law of evidence, and are explained in the Introductory Comment to Article V.

A. *Rule 501. Privileges recognized only as provided*

Rule 501 has the effect of incorporating all privileges recognized by rules of procedure, statute, and constitution but recognizes only those privileges. This has the added effect of cutting off any further recognition of privileges by case law and so required adoption, in Rule 502, of a particular privilege recognized only by decisional law in Montana. This rule also sets out the four elements of a testimonial privilege allowing a person: to refuse to be a witness, to disclose any matter, to produce any object or writing, or to prevent another person from taking any of these actions.

B. *Rule 502. Identity of Informer*

Rule 502 is the only rule dealing with a specific privilege. Recognition of the privilege against disclosure of an informer's identity is made necessary by Rule 501 which cuts off further recognition of privileges by case law and recognizes only those in rules of procedure, statute and constitution. This privilege has been recognized only by case law in Montana[169] and so had to be included in this rule if it was to be recognized as a continuing part of Montana law.

This privilege is unique in several aspects. Generally, a confidential relationship which gives rise to a testimonial privilege allows

169. State v. Hall, 158 Mont. 6, 17, 487 P.2d 1314, 1320 (1971); State *ex rel.* Offerdahl v. District Court, 156 Mont. 432, 435, 481 P.2d 338, 340 (1970).

the parties to that relationship to be the holders of a privilege, insures that no one testifies as to the substance of their confidential communications, and allows the holders to waive the privilege. However, the privilege bestowed in Rule 502(a) is held by the United States or a state or subdivision thereof, not the informer. Thus, only the government may claim the privilege under Rule 502(b). The privilege covers only the identity of the informer, not the substance of his communication. The privilege may be waived by the informer, under Rule 502(c) even though he does not hold the privilege. However, these unique aspects are consistent with the purpose of the privilege as expressed by the leading United States Supreme Court ruling in *Roviaro v. United States:*[170]

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and by preserving their anonimity, encourages them to perform that obligation.
>
> The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of the communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

Finally, Rule 502(c) specifies the exceptions and limitations of the rule. *Roviaro* indicates that when the identity of the informer becomes known the privilege is waived, and subdivision (c) indicates this waiver may be accomplished by the holder of the privilege (the government), the informer's own action, or by having the informer testify. The other limitation of the privilege stated in Rule 502(c)(2) is also taken from *Roviaro.*[171]

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the government withholds the information, dismiss the action.

The Rule allows the public entity which invokes the privilege to show facts relevant to determining whether the informer can supply testimony relevant to such a fair determination of the action, and

170. 353 U.S. 53, 59-60 (1959).
171. *Id.* at 60.

if the court finds the public entity should disclose the identity and it elects not to do so, the court may dismiss the charges in a criminal case or make any order that justice requires in a civil case. The test for making this determination was also stated in *Roviaro* and approved in Montana:[172]

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors.

C. *Waiver of Privilege by Voluntary Disclosure: Non-waiver in Certain Instances*

Rules 503 and 504 are concerned with all privileges generally and with disclosure of privileged information as it affects waiver. Rule 503(a) is taken from Uniform Rule (1974) 510. It codifies the common law rule that when a person ceases to treat a matter as privileged, the privilege terminates. The Advisory Committee's Note[173] indicates the rationale of this rule: "[T]he central purpose of most privileges is the promotion of some interest or relationship by endowing it with a supporting secrecy or confidentiality. It is evident that the privilege should terminate when the holder by his own acts destroys the confidentiality."

The Commission Comment details the correct application of the Rule, for the intention of the holder of the privilege is not the only factor to be considered. Wigmore has proposed a test that is concerned with fairness, for at a certain point an objective view would determine there has been a waiver, despite the subjective intention of the holder not to voluntarily disclose. His test further considers consistency, for at that same point, almost any person would determine a disclosure had been made, despite subjective intentions of the holder.[174] The subdivision therefore does not require knowledge of waiver by the holder to waive the privilege: the use of the word "voluntary" is intended to take into account the next rule, Rule 504. The subdivision also uses the phrase "substantial part" to allow a person to disclose anything up to a "substantial part" of the communication before waiver is accom-

172. *Id.* at 62; State *ex rel.* Offerdahl v. District Court, 156 Mont. 432, 436, 481 P.2d 338, 340 (1971).

173. 56 F.R.D. 183, 259 (1972) (deleted by Congress).

174. 8 WIGMORE ON EVIDENCE § 2327, at 636 (McNaughten Rev. 1961).

plished. The subdivision is contrary to the common law and new to Montana law on these two points.

Rule 503(b) governs the situation in which there are two or more persons holding a privilege and the effect of waiver by one person upon the other person's privilege. This subdivision provides that such disclosure does not affect the other person's privilege, for the holder of a privilege should not suffer the consequences from a waiver over which he had no control.

Rule 504 deals with disclosure of privileged matters by the holder when that disclosure is compelled erroneously or without opportunity to claim the privilege. As the Commission Comment indicates, the Rule in the first situation allows the holder to disclose privileged matter under court order, yet still claim the privilege later if it is found that the court was in error. The severe common law rule that a person must exhaust all legal remedies or risk incarceration to maintain his privilege was rejected. The second situation concerns disclosure of privileged matters by persons other than the holder without his knowledge. In this case the common law rule allowing "eavesdroppers" to waive a privilege by disclosing privileged matter is rejected.

D. *Comment Upon or Inference From Claim of Privilege*

Rule 505 is intended to allow holders of a privilege to claim their privilege without fear that so doing will adversely affect them or the parties for whom they are testifying. It does so by not allowing the claims of a privilege to be a proper subject of comment by counsel or the court and by not permitting an inference to be drawn from a claim of privilege. It is obvious that when an adverse comment or inference may be made, the effectiveness of privileges is greatly lessened. As the Advisory Committee indicated, privileges are "founded upon important policies and are entitled to maximum effect."[175] Therefore, the jury should not be made aware of a claim of privilege.

VI. ARTICLE VI WITNESSES

Article VI, Witnesses, is an important article because of its breadth of coverage and changes to Montana law. There are three distinct areas concerning witnesses: competency, or the legal fitness of the person to testify, in Rules 601 through 606; impeachment of the credibility of witnesses, in Rules 607 through 610 and 613; and conduct of trial and rules of examination of witnesses, in Rules 611

175. Advisory Committee's Note to FED. R. EVID. 513 (deleted by Congress), 56 F.R.D. 183, 260 (1972).

through 615. The important changes brought about through this article are abolition of the deadman's statutes in Rule 601, allowance for impeachment of one's own witness in Rule 607, abolition of the doctrine of sponsorship of witnesses in Rules 607 and 611, abolition of impeachment for conviction of crime in Rule 609, and changes in the foundation requirements for impeachment by prior inconsistent statement in Rule 613.

A. *Competency*

1. *In general.*

Rule 601(a) indicates that all witnesses are competent, except as otherwise provided. The Advisory Committee describes this as "general ground-clearing [which] eliminates all grounds of incompetency not specifically recognized in succeeding rules. . . ."[176] This represents a culmination of reform efforts in the area of witness competency begun over a century ago.[177] The common law approach excluded a witness as incompetent if it appeared at all likely that the witness was unable or unwilling to tell the truth.[178] Those grounds can be categorized as the five i's: interest in the action; insanity, in that a person suffering from mental illness did not have the capacity to testify; infancy, in that a child did not have the capacity to remember or understand what it is to tell the truth; infidelity, in that a person who did not believe in a supreme being could not be trusted to follow an oath; and infamy, in that a person convicted of crime could not be trusted to tell the truth.[179] Some of these grounds of incompetency have been transformed into a ground of impeachment of the credibility of the witness,[180] because certainly hearing the witness' testimony for whatever it is worth is preferable to no information at all.

When the rule of incompetency for interest was abolished, an exception was carved out. Compromise forced the reformers to exclude the testimony of persons testifying as to transactions between themselves and deceased persons.[181] This rule, commonly known as the deadman's statute, is abolished by Rule 601(a), in that the Rules do not mention it. The reasons for the Commission's decision to abolish the deadman's statute in Montana rest upon several considerations. First there is uncertainty over the application of the

176. Advisory Committee's Note to FED. R. EVID. 601, 56 F.R.D. 183, 262 (1972).
177. MORGAN, *supra* note 35, at 80.
178. 2 WIGMORE ON EVIDENCE § 576, at 686 (3d ed. 1940).
179. Slovenko, *Witnesses, Psychiatry and Credibility of Testimony*, 19 U. FLA. L. REV. 1, 3 (1969).
180. MCCORMICK, *supra* note 22, at 139.
181. *Id.* at 142.

statute due to conflicting case law interpretation. Second is the Commission's belief that the deadman's statutes rest upon the false premise that persons who have an interest should be excluded because this interest will cause them to lie. Third is the concern that problems of perjury are not properly solved by excluding witnesses. Finally, there are undesirable results from application of the deadman's statutes, which allow concern for deceased persons' estates to supersede concern for living persons' property rights and which have the effect of excluding valuable evidence.

The first rule of disqualification following Rule 601(a)'s "all witnesses are competent" provision is found in Rule 601(b) which excludes two categories of witnesses: those who are incapable of expressing themselves and those that are incapable of understanding the duty to tell the truth. As the Commission Comment points out, these grounds are commonly used in Montana when the competency of insane persons and children is tested. The Commission considered this Rule a necessary addition to the Federal Rules because no other provision specifically allowed a judge to exclude witnesses on this basis.

2. *Personal Knowledge.*

Rule 602 provides the second rule of disqualification of witnesses, that a person may not testify unless he has personal knowledge of the facts about which he testifies. As the Commission Comment points out, this is a universally recognized requirement consistent with existing Montana law. The Rule is not intended to exclude testimony of witnesses who are not capable of expressing themselves with positiveness but do so clumsily,[182] by use of such expressions as "I believe" or "it was my impression" or "I suppose" or "I guess".[183] Rather, it requires a foundation to be laid showing the witness to have been in a position to observe the events about which he testifies. An exception is provided in this Rule by cross-reference to Rule 703, which allows an expert to base his opinion on the observations of other persons and not his own personnal knowledge.

3. *Oath or affirmation.*

Rule 603, the third rule of disqualification for lack of competency, requires the witness to testify under oath or affirmation. This Rule follows the current theory of oaths and affirmations, that they

182. State v. Vanella, 40 Mont. 326, 339, 106 P. 364, 368 (1910).
183. 2 WIGMORE ON EVIDENCE § 658, at 768 (3d ed. 1940).

are symbols intended to induce a feeling of obligation in witnesses and to make them understand the penalty for not telling the truth.[184]

4. *Interpreters.*

Rule 604 provides a rule made necessary by the provisions of Rule 601 which declares all witnesses to be competent unless they are incapable of expressing themselves. This Rule allows persons incapable of speaking English to have their testimony translated by interpreters qualified under this Rule. The Rule requires that the interpreter be administered an oath or affirmation and that he be qualified as an expert in the interpretation of the language which he is to translate. As the Commission Comment points out, the first requirement is consistent with Montana law but the second is new. The Rule should be used in conjunction with Rule 43(f), Montana Rules of Civil Procedure, allowing the court to appoint an interpeter at its discretion.

5. *Judges.*

Rule 605 provides the fifth rule of disqualification by completely disqualifying judges from testifying as witnesses at trials or proceedings over which they are presiding. The Advisory Committee stresses the importance of allowing the judge to maintain a role of impartial arbiter, and of his maintaining that position throughout trials. It emphasizes as well the difficulty of effective examination, and the influence on the jury of the judge as a witness.[185] Certainly, the better policy is to not allow presiding judges to testify, as the Commission concluded when it changed existing Montana law.[186]

6. *Jury.*

Rule 606(a) is the equivalent to Rule 605 on disqualification of judges; it provides the sixth and final rule of disqualification, that jurors are not allowed to testify in trials in which they are sitting. As noted in the Commission Comment, it is impractical to believe that there can be effective cross-examination of a juror, or that the juror and jury could effectively weigh the juror's testimony against contrary evidence. Thus it concluded that it was proper to change existing Montana law[187] to exclude jurors from testifying.

Rule 606(b) is concerned with a different problem than testimony of jurors at the trial in which they are sitting. It deals with

184. McCormick *supra* note 22, at 582.
185. Advisory Committee's Note to Fed. R. Evid. 605, 56 F.R.D. 183, 264 (1972).
186. R.C.M. 1947, § 93-701-5.
187. *Id.*

the competency of a juror to testify as to the validity of a verdict or indictment reached by the jury or grand jury of which he was a member. The general rule is that a juror may not testify to impeach the verdict reached by the jury upon which he sat. Wigmore believed the rule arose from three independent principles: the privilege of jurors to keep all communications confidential; an extension of the parole evidence rule making all motives, issues and behavior leading up to a verdict incompetent evidence; and the rule that a witness may not testify as to his own terpitude or the self-stultifying rule applied to jurors.[188] According to the Advisory Committee, "the values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. . . ."[189] However, the Rule is not one that absolutely bars juror testimony, because "simply putting verdicts beyond effective reach can only promote irregularity and injustice."[190] Therefore, Rule 606(b) delineates what may not be testified to, including "any matter or statement occurring during the course of the jury's deliberation, or . . . the effect of anything upon his or any other juror's mind or emotions . . . or concerning his mental processes. . . ." It goes on to state that jurors may testify to the following matters occurring during the course of the jury's deliberations: extraneous prejudicial information; outside influence brought to bear upon any juror; and whether the verdict was decided by a resort to chance. As the Commission Comment indicates, until recently, no exceptions to the general rule were allowed under Montana case law, but more recent decisions provide exceptions which fit within the first two categories, and an existing Montana statute[191] provides the third category.

B. *Impeachment*

Rules 607 through 610 and 613 are concerned with impeachment, although only two Rules, 608 and 613, allow any specific types of impeachment. The Commission Comment to Rule 607 indicates that it concluded that the broad language of Rule 607, allowing the credibility of witnesses to be attacked, means that impeachment by traditional methods are incorporated in the Rules. Those methods listed in the Comment include bias for or against any party in the case, interest in the outcome, motive to testify falsely, lack of capacity of the witness to perceive, recollect or communicate, and contradiction. Rule 608 allows impeachment by the use of character evi-

188. 8 WIGMORE ON EVIDENCE § 2345 at 667 (McNaughten Rev. 1961).
189. Advisory Committee's Note to FED.R. EVID. 606(b), 56 F.R.D. 183, 265 (1972).
190. *Id.*
191. R.C.M. 1947, § 93-5603(2).

dence and Rule 613 impliedly allows impeachment through the use of prior inconsistent statement by providing foundational requirements.

Rule 607 allows the credibility of any witness to be attacked by any party, including the party calling him. The reason the Commission adopted this Rule, which is contrary to existing Montana law, is that the traditional rule not permitting a party to impeach his own witness was based upon two invalid assumptions. These were that a party vouches for the credibility of his own witnesses and that a party could coerce his own witness to testify as the party pleased by intimidating the witness with impeachment, were it not for the traditional rule.[192] Further, the traditional rule as interpreted in Montana had its exception allowing a party to impeach his own witness if the testimony prejudiced his case and surprised him. Since a party does not vouch for his witnesses, but generally takes the persons available to testify as to the occurrence of an incident,[193] and as a practical matter can impeach his own witness when the need arises by claiming prejudice and surprise, the effect of this Rule is simply to remove the artifical barriers to allowing impeachment of one's own witness. The corollary of the traditional rule that a party may not impeach his own witness is that he is bound by the testimony of witnesses he presents. The Commission considered it logical that if impeachment of one's own witness is to be allowed, then certainly no party could be bound by the testimony of any witness and so incorporated this concept into Rule 607(b). This has the effect of abolishing two of the five assorted rules comprising the doctrine of sponsorship of witnesses, to be discussed in conjunction with Rule 611(b).

Rule 608 allows impeachment by use of character evidence. This Rule should be considered in conjunction with Rules 404 and 405 dealing with character evidence. As noted in the discussion of those Rules, when character evidence is used circumstantially, there is a problem as to whether the proof of the character trait is in fact relevant to proof of the conduct which is to be inferred from it. In this instance, is proof of a character trait a sufficient basis upon which the trier of fact may infer that the person is or is not telling the truth in the testimony given at that trial? The answer that Rule 608(a) provides is that use of reputation or opinion to prove a character trait of a witness is subject to the limitations that the evidence may refer only to character for truthfulness or untruthfulness and that evidence of truthful character may only be offered after the

192. *See* 3A WIGMORE ON EVIDENCE §§ 896-98 (Chadbourn Rev. 1970).

193. Advisory Committee's Note to FED. R. EVID. 607, 56 F.R.D. 183, 266-67 (1972).

witness' character has been attacked. The first limitation narrows the scope of character evidence offered to impeach witnesses in that Montana has provided that evidence of "reputation for truth, honesty, and integrity" has been allowed.[194] Proof of character by opinion is new to Montana, as indicated by the discussion of Rule 405. The second limitation, also indicated in the discussion of Rule 405, that proof of good character is allowed only after attack, is consistent with Montana law.

Rule 608(b) is concerned with the problem of proof of character through specific instances of conduct. As noted in the discussion of Rule 405(b), this is the most persuasive and at the same time, the most prejudicial means of proof of character. For example, if it is shown that a witness has committed perjury in a previous trial, this is persuasive "proof" that the character trait of not telling the truth exists with that witness. However, does the fact that the witness has committed perjury in the past really indicate whether or not he is telling the truth now? Because of this problem, the use of specific instances are limited, first, in the discretion of the court if probative of truthfulness or untruthfulness; second, to the cross-examination of either the witness whose character is being attacked or other character witnesses; and finally by the general provision of the rule not allowing proof of specific instances by extrinsic evidence. In other words, specific instances of conduct cannot be proven by extrinsic evidence and when they are used on cross-examination, the court is to use its discretion to insure that the specific instance actually occurred. The use of specific instances of conduct is a change to existing Montana law, but under the limitations it is a sensible change, and one that is necessary when Rule 609 is taken into account.

Rule 609 changes Montana law by not allowing impeachment for conviction of a crime. The Commission Comment indicates that the Federal Rule has provisions not allowing this type of impeachment if the witness has obtained a certificate of rehabilitation or other equivalent procedure, but under constitutional and statutory provisions in Montana[195] this would severely limit the use of this type of impeachment. Under Montana practice the witness may be asked if he has ever been convicted of a felony, but if an affirmative answer is given, the inquiry is closed. Therefore, the Commission felt adoption of the Federal Rule with Montana practice would result in a rule of limited usefulness allowing the question "Have you

194. R.C.M. 1947, § 93-1901-11.

195. Note that State v. Gafford, ___ Mont. ___, 563 P.2d 1129, 1134 (1977), specifically rejected the idea that either MONT. CONST. art II § 28 or R.C.M. 1947, § 95-2227(3) (Supp. 1977) could be the basis for not allowing this form of impeachment.

ever been convicted of a felony" to be asked of persons currently under state supervision. But the principal reason the Commission rejected this type of impeachment is its low probative value in relation to credibility. The Commission did not accept the premise that willingness to commit a crime can readily be translated into a willingness to lie as a witness, nor did it accept the idea that the proof of conviction of a crime relating to or probative of credibility should be allowed as a matter of convenient proof. It is the specific instance of conduct underlying the conviction which is relevant to credibility, and this is what is to be used to impeach under Rule 608. This bars impeachment for crimes not relating to credibility, which prevents severe embarrassment to witnesses, prevents confusion among jurors who see no relation between conviction of crime and credibility, and prevents prejudice against witnesses by jurors who view with distrust testimony from persons convicted of a felony, even though not related to credibility in that case.

Rule 610 provides the rule that evidence of religious beliefs is not admissible for proving this has any effect on a witness' credibility. The Rule is identical to the Federal Rule and does away with any possibility that nonbelief in a supreme being may be used to show a person is not credible or the reverse, that belief in a supreme being shows inherent credibility. The Advisory Committee's Note to Rule 610[196] indicates this is not intended to bar inquiry into membership in a church or group where that church, group or a member thereof is a party to the case and the inquiry goes to bias.

C. *Conduct of Trial and Examination of Witnesses*

Rule 611(a) states the general rule controlling the conduct of trial and examination of witnesses by placing this power with the trial court. The court's power allows control over the mode and order of interrogating witnesses and presentation of evidence. As the Commission Comment indicates, mode of interrogation refers to the form of question, whether asking for specific answers or general narration, and order of interrogation, while presentation refers to the normal manner in which the parties present evidence and alteration from that norm. The subdivision also states three goals which courts should keep in mind in the conduct of trials: first, to "make the interrogation and presentation effective for the ascertainment of truth," second, to "avoid needless consumption of time," and third, to "protect witnesses from harassment or undue embarrassment."

Rule 611(b), governing scope of cross-examination, states in its first sentence the standard rule that cross-examination should be

196. 56 F.R.D. 183, 272 (1972).

limited to the subject matter of the direct examination and matters affecting credibility. However, the second sentence allows the court to permit inquiry during cross-examination as to new matters as if on direct. As the Commission Comment indicates the first sentence is to allow the normal order of proof during trial, that is to have the party with the burden of persuasion present evidence, and the other side present its evidence. However, if the trial court believes that there would be a savings of time or that it should allow complete questioning of a witness, the second sentence allows the cross-examiner to exceed the scope of ordinary cross-examination. Since this is allowed, the Commission felt it imperative that matters so developed should be allowed as proof of any fact in issue in the case, hence the addition of clause (2).

As noted in the discussion of Rule 607, these two Rules have the effect of abolishing the doctrine of sponsorship of witnesses. There are five rules associated with that doctrine which are superseded by the Rules: first, the rule that a party may not impeach his own witness is abolished by Rule 607(a); second, the rule that a party is bound by the testimony of his witnesses is abolished by Rule 607(b); third, the rule that parties may not exceed the normal scope of cross-examination is clarified by Rule 611(b)(1); fourth, the rule not allowing a party to make out his case on cross-examination is abolished by Rule 611(b)(2); and finally the combination of these four rules in Montana case law that had resulted in a rule that if a party exceeds the scope of cross-examination he makes the witness his own, is bound by his testimony, and cannot impeach him, is abolished by Rules 607 and 611(b). (See Commission Comment to Rule 611(b).)

Rule 611(c), concerned with the use of leading questions, follows the general rule not allowing them because they result in the questioner placing the desired answer in evidence, not the witness, and raising the danger of acquiescence in a false suggestion.[197] Of course, there are exceptions to the general rule concerned with proper development of testimony of hostile, unwilling or biased witnesses, children, adult witnesses with communication problems, witnesses whose memory is exhausted, or bringing out undisputed preliminary matters.[198] The Rule changes the law to the extent that it allows hostile witnesses, adverse parties or witnesses identified with adverse parties to be automatically treated as hostile.[199] In permitting leading questions in what is a cross-examination type of situation, the Rule uses the word "ordinarily" and so would not

197. McCORMICK, *supra* note 22, at 8.
198. Advisory Committee's Note to FED. R. EVID. 611(c), 56 F.R.D. 183, 275-76 (1972).
199. *Id.* at 276.

permit leading questions during the cross-examination of a witness hostile to the opponent, for this is essentially a direct examination.

Rule 611(d) and (e) were added to the Federal Rule to accomodate the existing Montana statutes[200] concerning re-examination and recall of witnesses and the right of an adverse party to be present at the examination of witnesses.

Rule 612 concerns the procedural aspects of what may be done with a writing used to refresh the memory of witnesses. It is crucial that practitioners remember the difference between these writings and writings which are a recorded recollection, treated as a hearsay exception in Rule 803(5). As the Commission Comment indicates, a witness refreshing his memory has an independent recollection of the event, but needs his memory jogged. Once the writing is referred to, the witness should be capable of testifying without it. Therefore, the witness' memory and not the writing is going into evidence. A recorded recollection under Rule 803(5) is used when a witness who has no independent recollection, but who had, at a previous time when the event was fresh in his memory, written down the events. The statement is read to the jury, rather than being testified to from memory. A foundation is required under Rule 803(5) to allow this to be done.

The purpose of Rule 612 is "to promote the search of credibility and memory"[201] and to insure that the witness is in fact refreshing his memory from the writing, not testifying from it, by testing the credibility of that memory with the use of the writing in cross-examination. In order to fulfill its purposes the Rule allows the adverse party the right to have the writing produced, to inspect it, to cross-examine the witness using it, and to introduce into evidence portions which relate to the testimony of the witness. The Rule also has provisions for excising irrelevant portions and preserving the writing for appellate courts in the event rulings of this nature are challenged. Finally, the Rule has provisions penalizing the party who does not produce writings pursuant to the Rule, including provisions to strike the testimony, to declare mistrial, or to make any order justice requires.

Rule 613 sets out the requirements of examining witnesses using writings or prior statements they have made. It has the effect of abolishing two common law rules, in subdivision (a), the rule in Queen Caroline's Case requiring the witness' own written statements to be shown to him before examination about them, and in subdivision (b), the common law rule requiring a foundation before

200. R.C.M. 1947, §§ 93-1901-10 and 93-401-3.

201. Advisory Committee's Note to FED. R. EVID. 612, 56 F.R.D. 183, 227 (1977).

impeaching a witness with his prior inconsistent statement. The Advisory Committee indicates that each of the changes is intended to allow more effective cross-examination and impeachment by not allowing the witness the opportunity to plan a response to what appear to be inconsistencies.[202] Subdivision (a) does provide that opposing counsel shall be shown written statements used to examine witnesses to insure that they do say what the examiner purports them to say. Subdivision (b) changes the usual foundation requirements long recognized in Montana[203] which require the witness to be asked whether or not he made a particular statement at a certain time, in a certain place with certain persons present. It requires only that extrinsic evidence may not be used to prove a prior inconsistent statement unless the party is afforded an opportunity to explain or deny the statement and the opposite party is allowed to interrogate him thereon. The change is to one of a less formal foundation and, most importantly, time sequence, since the opportunity to explain need not occur before the impeachment.[204] The subdivision also includes language "or the interests of justice otherwise require" which could allow the court to waive any requirements to the introduction of the prior inconsistent statement if the witness is unavailable to explain the statement.[205] These statements may also be considered as substantive evidence under Rule 801(d)(1)(A).

Rule 614 provides the court with the power to call and interrogate witnesses on its own motion, or at the suggestion of a party. As the Commission Comment indicates, this Rule is usually invoked where neither side wishes to call an undesirable witness. The court can solve this problem by calling him itself. While the Commission does not intend the rule to allow courts to join in as an adversary, the court should be allowed to do what it can to get at the truth.[206] The Rule also provides that when the court is interrogating witnesses, it should be careful to be and to appear impartial. Objections to questions asked may be made when the jury is not present.

Rule 615 provides the rule allowing the sequestration of witnesses, but as the Commission Comment notes, changes Montana law by allowing this procedure to be a right of the party rather than within discretion of the court. The purpose of the Rule is to provide an effective "means of discouraging and exposing fabrication, inaccuracy and collusion."[207] The Rule does not authorize exclusion of

202. Advisory Committee's Note to FED. R. EVID. 613, 56 F.R.D. 183, 278-79 (1972).
203. R.C.M. 1947, § 93-1901-12.
204. Advisory Committee's Note to FED. R. EVID. 613(b), 56 F.R.D. 183, 279 (1972).
205. *Id.*
206. State v. Mickelson, ___ Mont. ___, 565 P.2d 308, 311 (1977); State v. McConville, 64 Mont. 302, 304, 209 P. 987, 989 (1922).
207. Advisory Committee's Note to FED. R. EVID. 615, 56 F.R.D. 183, 280 (1972).

three categories of witnesses: parties, representatives of parties which are not natural persons, or persons whose presence is shown by a party to be essential to the presentation of his case. Note that the last category changes the case law rule in Montana[208] that police officers, sheriff's deputies and law enforcement officers are automatically exempt from exclusion.

VII. ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

A. *Lay Opinion*

The traditional lay opinion rule, the rule prohibiting lay witnesses from testifying as to their opinions, is based on the idea that an opinion of a witness is merely his belief and is not based on fact or personal knowledge.[209] However, when a witness gives a description, the distinction between "opinions" and "facts" is often difficult for courts to make.[210] As a result, courts created many exceptions to the rule. Lay witnesses were allowed to give opinions when describing "identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health. . . ."[211]

Rule 701 replaces the traditional opinion rule and its exceptions. It allows lay opinions but provides two safeguards: first, that the opinion is rationally based on perceived facts, and second, that the opinion is helpful to an understanding of testimony or facts in issue. This formulation of the rule is clearly superior to an exclusionary rule riddled with exceptions for admissibility. The safeguards will exclude opinions which are not based on fact or are not helpful. Although under this Rule there may be some slight chance of broad assertions, rather than detailed descriptions, such broad testimony will be subject to cross-examination and argument to demonstrate its weakness.[212]

Rule 704, opinions on the ultimate issue, applies to lay as well as expert testimony. This Rule allows testimony in the form of an opinion concerning the ultimate issue in the case. However, opinions which tell the jury what result to reach will not be allowed.[213]

208. *E.g.*, State v. Meidinger, 160 Mont. 310, 320, 502 P.2d 58, 64 (1972).
209. MCCORMICK, *supra* note 22, at 22.
210. Advisory Committee's Note to FED. R. EVID. 701, 56 F.R.D. 183, 281 (1972); Territory v. Clayton, 8 Mont. 1, 12, 19 P. 293, 297-98 (1888).
211. State v. Trueman, 34 Mont. 249, 253, 85 P. 1024, 1025-26 (1906).
212. Advisory Committee's Note to FED. R. EVID. 701, 56 F.R.D. 183, 282 (1972).
213. Advisory Committee's Note to FED. R. EVID. 704, 56 F.R.D. 183, 285 (1972).

B. *Expert Testimony*

There are three Rules applying exclusively to expert testimony: Rule 702, providing when expert testimony may be given, and qualifications of an expert; Rule 703, providing which facts or data may be the basis of an expert's opinion; and Rule 705, requiring disclosure of those facts or data.

Rule 702 sets out broad standards for allowing expert testimony. It allows "scientific, technical, or other specialized knowledge" which would assist the trier of fact. These standards are consistent with Montana law allowing expert opinion in areas "not within the range of ordinary training or intelligence . . ."[214] or on questions "involving matters too complex to be readily grasped by the average mind. . . ."[215] The qualifications of a person to be an expert are: "knowledge, skill, experience, training, or education. . . ." These are also consistent with existing Montana law.[216] It is interesting to note that the expert may testify as to his opinion *or otherwise.* This addition is in accord with the Article VII policy of making expert testimony helpful to the trier of fact. It is also consistent with one Montana case[217] which held that witnesses who were qualified as experts in accounting and bookkeeping could explain the meaning of various entries because this information was enlightening to the jury.

Ordinarily, expert testimony must be based on facts or data perceived by the expert himself, facts or data made known to the expert through other witnesses in the trial, or a hypothetical question.[218] Rule 703 expands the law in this area by adding a new provision that an expert may base his opinion on information reasonably relied upon by experts in that particular field, and that information need not be admissible in evidence. This expansion has already been made in Montana for physicians, experts in land valuation, and highway patrolmen qualified as experts in accident reconstruction. Thus, the only change this Rule brings to Montana law is its application to all experts. That is, now all experts may base their opinions on inadmissible evidence but the information they use for a basis must be of a type reasonably relied upon by other experts in their respective fields.

Rule 705 treats disclosure to the court, jury, and adverse parties of information used as the basis of an opinion. The usual practice

214. Kelly v. John R. Dailey Co., 56 Mont. 63, 79, 181 P. 326, 331 (1916).
215. Wibaux Realty Co. v. Northern Pac. Ry., 101 Mont. 126, 139, 54 P.2d 1175, 1181 (1935).
216. R.C.M. 1947, § 93-401-27(9).
217. State v. Cassill, 70 Mont. 443, 448, 227 P. 49, 55 (1924).
218. Advisory Committee's Note to Fed. R. Evid. 703, 56 F.R.D. 183, 283 (1972).

is to call upon the expert to answer a hypothetical question which contains all the facts pertinent to the opinion sought. This practice has been subject to "a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming."[219] Rule 705 allows an expert to give his opinion without any prior disclosure of the basis of his opinion, unless the court determines it would be helpful to do otherwise. Any points of weakness or controversy in the basis of the opinion should be brought out on cross-examination,[220] as provided in the second sentence of Rule 705.

Finally, Rule 704 allows an expert to give an opinion on the ultimate issue in the case. The Rule is consistent with Montana law which has long allowed such opinions. Of course it does not allow an opinion which merely tells the jury to reach a particular result ("I think the defendant was negligent"), to reach a legal conclusion, or to apply the law to the facts; further, the jury may accept or reject any expert's opinion.[221]

VIII. ARTICLE VIII HEARSAY

It is important to remember at the outset why hearsay evidence is excluded. When a witness testifies, the trier of fact should be allowed to consider his perception, memory, narration, and sincerity.[222] Therefore, in order to aid the trier of fact and ensure trustworthiness, three conditions are imposed: testimony is given under oath, in the presence of the trier of fact (to allow the demeanor of the witness to be observed), and subject to cross-examination.[223] Cross-examination is the most effective means to expose imperfections in perception, memory, narration, and sincerity.[224] But, of course, hearsay statements which are offered into evidence were not originally made under oath, in the presence of the trier of fact and, most importantly, were not subject to cross-examination. Therefore, because its reliability cannot be adequately tested, hearsay is generally excluded. Certain types of hearsay statements found to be inherently trustworthy are, however, admitted as exceptions.

Article VIII is organized to help understand the hearsay rules. First, Rule 801 states important definitions of basic terms and of statements which are not hearsay. Rule 802 states that hearsay is not generally admissible. Rules 803 and 804 state the exceptions to

219. Advisory Committee's Note to FED. R. EVID. 705, 56 F.R.D. 183, 285 (1972).
220. *Id.* at 286.
221. Commission Comment to MONT. R. EVID. 704.
222. Advisory Committee's Note to FED. R. EVID. art. VIII, 56 F.R.D. 183, 288 (1972).
223. *Id.*
224. *Id.* at 289.

the hearsay rule. Rule 805 applies to hearsay within hearsay. Rule 806 applies to attacking or supporting the credibility of makers of hearsay statements.

A. *Definitions, Statements Which are Not Hearsay, General Rule*

Rule 801 defines "statement" and "declarant" in subdivisions (a) and (b), which are necessary parts of the definition of hearsay in subdivision (c). There are two types of "statements". The first and most obvious type is an oral or written assertion. It is important to emphasize that written evidence is usually hearsay, and admissible only under an exception. The second type of statement is the nonverbal conduct of a person intended by him as an assertion. This type will seldom be used. If the conduct is intended to achieve some other result than to communicate, there is no likelihood of intent to deceive, faulty perception, memory, narration or lack of sincerity. But when a person intends to communicate through non-verbal conduct, such as the nod of a head or waive of a hand, a message may be conveyed. That message was not made under oath, in the presence of the trier of fact, nor subject to cross-examination. Therefore, conduct which is a substitute for speech is included in the rule against hearsay because its reliability cannot be tested.

Since subdivision (b) simply defines "declarant" as a *person* who makes a statement, human communcation is required. Subdivision (c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Besides nonverbal conduct,[225] already mentioned, there are two types of testimony which could arguably be hearsay. The first type is testimony given by a witness in court proceedings, which is specifically excluded from the definition of hearsay because such testimony complies with all the ideal conditions for testing its reliability.[226] The second excluded type is testimony which is not offered to prove the truth of the matter asserted, but merely to prove that the statement was made. It is excluded from the hearsay definition because there is no need to test the reliability of the perception, memory, narration, or sincerity of the maker of the statement. Indeed the truth of *his* statement is not at issue. Further, the reliability of the witness who is testifying that the statement was made is adequately tested. His testimony is being given in a court proceeding. But making the distinction between testimony offered for its truth and that offered merely to prove the statement was made is perhaps the most diffi-

225. 4 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE, 801-57 (1975).
226. Advisory Committee's Note to FED. R. EVID. 801(c), 56 F.R.D. 183, 295 (1972).

cult problem in determining the admissibility of the potential hearsay testimony. An example may be helpful. On the issue of the sanity of X, testimony is offered by a witness that X made the statement, "I am the King of England." Here the statement is not being offered to prove its truth, i.e., that X is King. It is offered to prove that the statement was made, so that X can be shown to be insane. There is obviously no need to test the reliability of X's statement. But when the witness testifies that X made the statement, he is in a court proceeding and subject to the three ideal conditions for testing reliability, and the testimony is not hearsay.

Rule 801(d) defines types of prior statement as not being hearsay. The first clause provides that a statement is not hearsay if the declarant is testifying at the trial or hearing, subject to cross-examination, and the statement is either inconsistent with his testimony, consistent with his testimony but offered to support it, or one of identification. The effect is that all other prior statements are hearsay and are admissible only if a hearsay exception applies. Arguably, a witness should be allowed to testify to all of his own statements. But Rule 801(d) represents a compromise between allowing all prior statements, which could lead to trial by prepared statement rather than testimony, and allowing no prior statement, which is not sensible in the particular instances set out in the Rule.[227]

First, the Rule makes prior inconsistent statements admissible as substantive evidence. The instruction providing that a prior inconsistent statement can only be considered for impeachment purposes is no longer correct. Note that Rule 613 alters the foundation requirements for prior inconsistent statements. Second, prior consistent statements offered to rebut an express or implied charge of fabrication, improper influence or motive are admissible. These statements are admitted to explain an apparent inconsistency or influence which arose after the original statement, by showing that the current testimony is consistent with the earlier statement. Third, statements of identification made by the witness after perceving a person are admissible. These statements are admitted because prior identification is more reliable than trial identification.[228] Identification testimony is rarely a hearsay problem.

The second clause of Rule 801(d) applies to admissions, statements made by a party which are offered against him by his adversary. These statements have always been substantive evidence.[229] There are five types of admissions allowed under this clause. The

227. Commission Comment to MONT. R. EVID. 801(d).
228. *Id.*
229. Commission Comment to MONT. R. EVID. 801(d)(2).

first type of admission is the party's own statement, in either his own or representative capacity. Admissions made in a representative capacity were not previously known in Montana.[230] The second type of admission is adoptive admissions, statements made by one other than the party but adopted by the party. Where the adoption of this statement is accomplished through silence, the label "tacit admission" is often applied. Although statutory authority would appear to be broader,[231] tacit admissions are the only adoptive admission recognized under existing Montana case law. There is difficulty in admitting tacit admissions in criminal cases where the accused has the right to remain silent.[232] The third and fourth types of admissions are those by agents of the principal who is a party. Clause (C) states the standard rule allowing admissions by agents authorized to make such statements; this rule has been justly criticized "since few principals employ agents for the purpose of making damaging statements. . . ."[233] As a solution to this problem, clause (D) states a more liberal rule. It allows statements of any agent if the statement concerns a matter within the scope of his agency and was made during the existence of the agency relationship. This is a change because former Montana law did not allow unauthorized statements, and authorized statements were allowed only if part of the res gestae.[234] The final type of admission is that made by co-conspirators. It states the generally recognized requirements that in order to be admissible, the statements must be in furtherance and during the course of the conspiracy.

Rule 802 expresses the basic provision that hearsay is not admissible, except as otherwise provided by statute, these Rules, or other rules applicable in the courts of this state. Surprisingly, until the adoption of Rule 802 Montana law did not express the hearsay rule. A few Montana cases[235] however, have found a section dealing with personal knowledge to have done so. Finally, the exception clause is intended to recognize that the law admits hearsay evidence where exceptions to the hearsay rule exist.

B. *Hearsay Exceptions*

Wigmore's theory provides the best starting point for understanding hearsay exceptions. His theory is that there are two under-

230. *Id.*
231. *Id.*
232. 56 F.R.D. 183, 298 (1972).
233. *Id.*
234. Commission Comment to MONT. R. EVID. 801(d)(2).
235. R.C.M. 1947, § 93-401-2, *construed in* Patterson v. Halterman, 161 Mont. 278, 282, 505 P.2d 905, 907 (1973) and Wilson v. Davis, 110 Mont. 356, 366, 103 P.2d 149, 153 (1940).

lying principles or requirements of any hearsay exception, the necessity principle and the principle of circumstantial guarantee of trustworthiness.[236] The necessity principle implies that hearsay evidence is necessary, even though untested by oath, presence of the trier of fact, and cross-examination. That is, unless the hearsay evidence is received, any benefit to be gained from information contained in it will be lost. Wigmore notes that there may be two reasons why the benefit may be lost. The first and strongest reason is that the hearsay declarant may not be available to give the testimony; no one else could give the testimony. Second, hearsay statements may be more accurate than statements made at trial by witnesses who are merely relying on their memory. Thus, by excluding hearsay testimony, the judicial system loses the benefit of more accurate evidence.[237] The second principle, circumstantial guarantee of trustworthiness, is that under some circumstances the hearsay statement is probably as accurate and trustworthy as testimony given under the three ideal conditions of oath, presence of trier of fact, and cross-examination.[238] Finally, Wigmore recognized that these two principles work together on a sliding scale. They are not to be applied with equal force with each hearsay exception.

The two rules containing hearsay exceptions can be explained in terms of Wigmore's principles. Rule 803 provides an exception for statements whose circumstantial guarantee of trustworthiness is so high that the availability of the hearsay declarant is of no consequence. That is, this is the type of hearsay which is at least as valuable as the memory of the witness at trial; therefore, the testimony is admissible regardless of whether or not the declarant is unavailable and the necessity principle is satisfied. Rule 804 contains hearsay exceptions which are of a lesser guarantee of trustworthiness. Therefore, the necessity principle must be satisfied; the testimony is admissible only if the hearsay declarant is unavailable.

There are twenty-four exceptions in Rule 803. It is sufficient to note that the circumstantial guarantee of trustworthiness of each exception is explained in the Commission Comment. The exceptions may be grouped as follows: (1) through (4) are spontaneous declarations; (5) through (18) are entries in documents; (19) through (21) are declarations concerning reputation; and (22) and (23) are judgments. The twenty-fourth exception is one allowing hearsay evidence to be admitted if the statement has circumstantial guarantees of trustworthiness similar to those contained in the enumerated

236. 5 WIGMORE ON EVIDENCE § 1421 (Chadbourn Rev. 1974).
237. *Id.*
238. *Id.* at § 1422.

exceptions, and is more liberal than its Federal counterpart. (See Commission Comment to this Rule.)

The first group of exceptions embraces part of the res gestae or transaction rule. The Montana version of that rule is much broader than an exception to the hearsay rule.[239] The rationale behind this group of exceptions is that statements made at or near the time of a transaction, by persons observing it, are quite accurate. When another person relates the statement at trial, his testimony is as likely to be accurate as the memory of the hearsay declarant would be if he were required to testify. The second group of exceptions recognizes that records or documents of an event, are likely to be more accurate than the memory of a person who could testify to the same facts contained in the writing. It is important to note that Article VIII governs the hearsay challenge to the admissiblity of writings, Article IX controls authentication of writings, and finally Article X requires production of the original. The provisions of these three articles must be met before any writing may be admitted. For example, a public record may be admissible as a hearsay exception under Rule 803(8), but it must also be authenticated under Rule 901(b)(7); moreover, copies of it may be introduced under Rule 1005 as an exception to Rule 1002 requiring production of the original. The third group of exceptions governs the admissibility of statements concerning reputation. Ordinarily, reputation statements, i.e., testimony as to what others in the community say about a person's character trait, are not challenged as hearsay. But since hearsay is necessarily involved in determining reputation, this exception is included to ensure that reputation evidence will be admitted. Finally, certain judgments are admitted as proof of their underlying facts, which have been proven under the three ideal conditions.

As mentioned, since statements under Rule 804 have a lesser circumstantial guarantee of trustworthiness, those exceptions require that the declarant be unavailable before the statement is admissible. The definition of "unavailable" is provided in subdivision (a) of the rule. It lists five instances in which the witness may be considered unavailable. They are to be applied uniformly to the hearsay exceptions which follow. It is important to note that physical presence of the declarant is not the criterion used to determine unavailability, but the test is whether or not the evidence contained in the statement can be elicited from the witness without introducing the hearsay statement. The first three instances of unavailability are examples of this concept. If a witness has a privilege and is

239. Commission Comment to MONT. R. EVID. 803(1).

so exempted from testifying, or persists in refusing to testify despite an order of the court to do so, or testifies to a lack of memory, the witness is physically present but is not a source from which the evidence can be elicited. The last two instances provide the more common criteria of unavailability—death or physical or mental illness or infirmity, and absence from the jurisdiction. If any one of these five instances of unavailability listed in subdivision (a) exists, then one of the five hearsay exceptions in subdivision (b) of this rule may be applied. The first exception in that subsection, former testimony, is different from the federal exception; it supplies a more liberal rule. Former testimony in civil actions is allowed if the motive, interest, and opportunity of a party against whom the testimony is offered is similar to those of any party cross-examining the witnesses at a former action. In criminal cases, the accused's confrontation right prevents this liberal rule from being applied. Instead, the exception allows former testimony only if the same party, that is, the party against whom it is currently being offered, had a similar motive and opportunity to cross-examine the witness at a former action. This differentiation between civil and criminal cases is in accord with Montana cases on use of former testimony.[240] Since former testimony is given under two of the three ideal conditions, oath and cross-examination, its guarantee of trustworthiness is obviously strong. However, the requirement of unavailability is still applied in order to encourage live testimony.

The second hearsay exception in Rule 804(b) is the classic, long-standing, dying declaration. The exception is captioned "statement under belief of impending death" rather than "dying declaration" because the declarant's death is no longer necessary for this exception; he need only be unavailable under one of the instances in subdivision (a). Just as at common law, however, the statement must be made while the person believes death is imminent and it must be a statement concerning the cause of death. Retaining these two requirements preserves the guarantee of trustworthiness for this exception. Contrary to prior law, these statements are now clearly admissible in civil as well as criminal cases.[241]

The third hearsay exception is commonly known as the declaration against interest. These statements are admitted because persons do not ordinarily make such statements unless they are true. Former Montana law included only statements against pecuniary and proprietary interests under this exception. This Rule expands the exception to include statements against social or penal interests

240. Commission Comment to MONT. R. EVID. 804(b).
241. *Id.*

as well. The fourth exception is similar to Rule 803(19), but expands the law to allow the statement of an unavailable family member or intimate friend concerning personal or family history. The final exception is similar to Rule 803(24); it allows the court to admit hearsay statements similar to others in Rule 804 if there is a similar circumstantial guarantee of trustworthiness.

C. *Hearsay Within Hearsay and Impeaching Hearsay Declarants*

Rule 805 provides a sensible solution to the problem of the admissibility of a statement which fits one hearsay exception but contains other hearsay. That solution is to allow the statement with multiple hearsay to be admitted if each of the particular hearsay statements would be independently admissible. This Rule is new Montana law.

Rule 806 allows impeachment or support of the credibility of hearsay declarants as if they had testified as witnesses. The Rule also suspends the Rule 613(b) requirement of allowing the witness to explain or deny inconsistent statements. Obviously, if the declarant is not testifying, there is no opportunity for him to explain or deny inconsistent statements.

IX. ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Authentication and identification have several purposes, the most important of which is ensuring relevance:

> Authentication and identification represent a special aspect of relevancy. . . .Thus a telephone conversation may be irrelevant because of an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved.[242]

Other purposes include preventing fraudulent or mistaken presentation of evidence,[243] and providing procedures to remind the trier of fact both that there must be a connection between documents or tangible objects and the facts at issue in the case and that there may be grounds for suspicion that the object or document is not what it purports to be. This purpose has been criticized.[244] There is valid criticism that authentication and identification are superfluous or can make a proponent's case seem weaker in the eyes of the jury.[245] Also, the obstacle to the introduction of forgeries which the require-

242. Advisory Committee's Note to FED. R. EVID. 901, 56 F.R.D. 183, 332 (1972).

243. Strong, *Liberalizing the Authentication of Private Writings*, 52 CORNELL L.Q., 284, 286 (1967).

244. Alexander & Alexander, *The Authentication of Documents Requirement: Barrier to Falsehood or Truth?* 10 SAN DIEGO L. REV. 266, 276 (1973).

245. *Id.*

ments provide is slight, especially when compared to the time and expense of authenticating documents which are genuine on their face.[246] In response to these criticisms, the federal drafters adopted several reforms. First, Rule 901(a) states a general provision for authentication and identification. Second, Rule 901(b) provides illustrations of that general provision; but this list of illustrations provides only examples and is not a limitation of the general principle in subdivision (a) of this rule. Third, Rule 902 provides a list of documents and writings which are accepted as self-authenticating when they are essentially genuine on their face. Finally, Rule 903 abolishes the requirement that subscribing witnesses testify to authenticate writings they have signed.

The general provision of Rule 901(a) states that in order for a writing to be authenticated or a physical object identified, all that is necessary is a foundation of evidence sufficient to support a finding that the writing or object is what its proponent claims. This requirement is generally consistent with existing Montana law, which has required a prima facie showing of a connection between the object or writing and the facts of the case by either circumstantial or direct evidence.[247]

The first illustration, testimony that the matter is what its proponent claims, is the most easily understood and probably most often applied of the illustrations in Rule 901(b). The second and third illustrations apply to lay and expert authentication of handwriting; they conform to existing Montana practice. The fourth illustration is the rule allowing distinctive characteristics and the like. Besides the reply letter doctrine recognized by Montana law,[248] the illustration applies to any other circumstance which indicates that a particular object is unique and, under the circumstances of the case, obviously genuine. The fifth and sixth illustrations apply to voice identification and telephone conversations, and are consistent with existing Montana law.[249] The seventh illustration applies to authentication of public records; it retains the standard method of authentication—simply presenting evidence that the document was recorded or filed in a public office where it would normally be kept. The eighth illustration provides a slight change in the law of authentication of ancient documents, although the same purpose as existed under former Montana law is fulfilled in the Rule.[250] The ninth illustration allows authentication of results of a process or

246. *Id.* at 277.
247. Commission Comment to MONT. R. EVID. 901(a).
248. Commission Comment to MONT. R. EVID. 901(b)(4).
249. *Id.*
250. *Id.*

system, such as X-rays, or computers.[251] The last illustration allows any other method of authentication allowed by statute or rule of court.

Rule 902 lists ten categories of writings or documents which are to be admitted without any foundation " . . . for reasons of policy, perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension."[252] This does not, of course, preclude a challenge to authenticity. These categories generally require the same authentication as in the past, but the mere showing that the document fits within the category removes the requirement for presentation of further foundation evidence in court. The first three categories are domestic public documents under seal, those not under seal, and foreign public documents. The fourth category allows certified copies of public records in the first three categories to be self-authenticating. The fifth category allows books, pamphlets or other publications issued by a public authority to be self-authenticating. The sixth category is a change in Montana law, allowing newspapers and periodicals to be self-authenticating. It is a sensible change, as a forged or false newspaper or periodical is extremely unlikely.[253] The seventh category is also a change in Montana law, allowing trade inscriptions, tags, or labels affixed in the course of business to be self-authenticating.[254] Acknowledged documents are self-authenticating under the eighth subdivision. Commercial paper and related documents, already allowed under the Uniform Commercial Code, are self-authenticating under the ninth category. Recognition is given to self-authenticating provisions contained elsewhere in existing Montana law in the tenth and last category.

As previously noted, Rule 903 abolishes the requirement that subscribing witnesses must testify to authenticate. The Rule does, however, defer to any statute specifically requiring the subscribing witness to testify.

X. ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Article X governs what is commonly known as "the best evidence rule." Since the Advisory Committee believes that is a misleading name,[255] and for the sake of clarity, it will be "the rule requiring the production of an original writing." The reasons for this

251. Advisory Committee's Note to FED. R. EVID. 901(b)(9), 56 F.R.D. 183, 335 (1972).
252. Advisory Committee's Note to FED. R. EVID. 902, 56 F.R.D. 183, 337 (1972).
253. Commission Comment to MONT. R. EVID. 902(6).
254. Commission Comment to MONT. R. EVID. 902(7).
255. Advisory Committee's Note to FED. R. EVID. 1001, 56 F.R.D. 183, 341 (1972).

Rule include the importance of exact words in a document (a slight difference affects parties' rights); accuracy; prevention of fraud; and authenticity (which a copy would not have).[256] One commentator argues that with today's broad discovery provisions, the rule requiring the production of the original is unlikely to be useful, and should therefore be abolished.[257] The Advisory Committee's position is that the rule is useful, for example, when a document is outside the jurisdiction and not discoverable, or in criminal cases.[258] The Article contains several provisions broadening the rule to ease its application where it is not needed but to retain it where it is needed. Rule 1001 provides definitions; Rule 1002 states the basic rule; 1003 is an exception for duplicates; 1004 lists general exceptions to the Rule; 1005 is an exception for public records; 1006 allows summaries; and 1007 is an exception for written admissions of a party.

The definitions in Rule 1001 are those applied throughout Article X. First, the definition of writing or recording covers any type of information storing system, ranging from the usual documents to any form of electronic recording. Second, photographs are defined to include all types, including X-rays, video tapes, and motion pictures. Third, originals are defined to include not only the writing itself, but also any "counterpart intended to have the same effect by a person executing or issuing it." Thus, the duplicate original rule is included in the concept of original.[259] Original also includes the negative or any print of a photograph, or any printout readable by sight from a computer or similar device. Fourth, duplicate is defined as a counterpart produced by the same impression as the original, or by photographic, mechanical, chemical or other means of reproduction. The definition of duplicate is particularly important under Rule 1003, because it makes duplicates admissible to nearly the same extent as an original. The last definition, entries in the regular course of business, is not found in the Federal Rule, but already exists by statute in Montana. It was adopted to ensure that this useful statutory exception to the rule requiring the production of the original will still be followed. The Rule applies to copies made by manual or mechanical means at or near the time of the transaction they record, usually taken from several originals and transferred to another type of record. Duplicates, on the other hand, cannot be manually copied from the original. Both this definition and the definition of duplicate are incorporated in Rule 1003.

256. 5 WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE 1002-05 (1975).

257. Brown, *Authentication and Contents of Writings*, 1969 LAW & SOC. ORD. 611, 612, 617 & n. 44.

258. Advisory Committee's Note to FED. R. EVID. 1001, 56 F.R.D. 183, 341 (1972).

259. Commission Comment to MONT. R. EVID. 1001(3).

Rule 1002 states the basic rule that if a proponent of evidence wishes to prove the content of a writing, recording, or photograph, the original is required, except as otherwise provided. It is important to note that the mere fact that an event was recorded does not mean that the writing upon which it was recorded is needed to prove the event, but that when " . . . the event is sought to be proved by the written record, the rule applies."[260] It only applies to photographs in a few important instances. It is also important to note that the Rule does not apply to photographs when they are used for illustrative purposes only.[261] The Rule applies to photographs used in cases of copyright, defamation, or invasion of privacy, or where the photograph has "independent probative value, e.g., automatic photograph of a bank robber."[262]

Rule 1003 is the first exception to the rule requiring the production of the original writing to prove its contents. This exception allows two types of writings to be admitted "to the same extent as the original" unless a genuine question of authenticity of the original is raised, or it would be unfair to admit the writing, or it is not allowed by statute. As mentioned, the types of writing are duplicates, as defined in Rule 1001(4), and copies of entries in the regular course of business, as defined in Rule 1001(5). The addition of copies of entries in the regular course of business and the reference to the possible statutory disallowance are changes from the Federal Rule, making it comply with existing Montana law.[263] The liberal admission of duplicates, the most common of which are photocopies, is an expansion of Montana law. It is a sensible expansion because the purposes of the rule requiring the production of the original are satisfied by a duplicate which is accurate and genuine.[264]

Rule 1004 provides the second group of exceptions to the rule requiring the production of the original; these four distinct exceptions contained in the Rule are generally accepted law. The first allows any other evidence of the contents if the original is lost or destroyed; the second allows it if the original is not obtainable; the third allows other evidence if the original is in the possession of the opponent and after notice he does not produce it; and the fourth allows other evidence if the writing is not closely related to a controlling issue, or proves a collateral matter. The fourth exception is new to Montana law, but the other three are consistent with statutory and case law.[265]

260. Advisory Committee's Note to FED. R. EVID. 1002, 56 F.R.D. 183, 342 (1972).
261. Commission Comment to MONT. R. EVID. 1001(2).
262. Advisory Committee's Note to FED. R. EVID. 1002, 56 F.R.D. 183, 342 (1972).
263. Commission Comment to MONT. R. EVID. 1003.
264. Advisory Committee's Note to FED. R. EVID. 1003, 56 F.R.D. 183, 343 (1972).
265. Commission Comment to MONT. R. EVID. 1004.

Rule 1005 is the third exception to the rule requiring the production of the original. It provides that the contents of public records may be proven by a certified copy or by a copy testified to as correct. This exception is in accord with the public policy of keeping such records in the custody of the public official whose duty it is to safeguard them.[266] The second sentence of the Rule, allowing other evidence if a copy is not available could be an expansion of existing Montana law.[267]

Rule 1006 is the fourth exception to the rule requiring the production of the originals. It allows summaries of voluminous originals to be introduced, although it requires the original to be available to the parties and the court for inspection. This exception is also consistent with existing Montana law.[268]

The final exception to the rule requiring production of the original is Rule 1007. It allows the contents of writings to be proved by the testimony or deposition of the party against whom it is offered, without accounting for the original. This change to Montana law is certainly a sensible improvement to the law of evidence. Indeed, the main purpose of the rule requiring production of the original is the protection of the adverse parties, but if those parties admit the contents of the writings, there is no need to produce them.[269]

The final Rule in Article X, Rule 1008, simply provides that the court shall determine whether or not foundational requirements of this Article are fulfilled and shall determine the admissibility of extrinsic evidence to prove the contents of original documents.

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266. Commission Comment to MONT. R. EVID. 1005.
267. *Id.*
268. Commission Comment to MONT. R. EVID. 1006.
269. Commission Comment to MONT. R. EVID. 1007.